145—393

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

~~No. 1390~~ ~~992~~ 649 ~~343~~ 43

THE ST. LOUIS, VANDALIA AND TERRE HAUTE RAILROAD COMPANY, APPELLANT,

vs.

THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED MARCH 19, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, MARCH 20, 1888.

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Exhibit "A"—An act to incorporate The St. Louis, Vandalia & Terre Haute Railroad Company, approved Feb. 10, 1865	98	53
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1 Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the Honorable Walter Q. Gresham, judge of the seventh judicial circuit, presiding judge, and the Honorable William J. Allen, judge of the district court of the United States for the southern district of Illinois, on Tuesday, the twenty-fourth day of January, in the January term of said court, in the year of our Lord one thousand eight hundred and eighty-eight, and of our Independence the one hundred and twelfth year.

JAMES T. JONES, *Clerk.*

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

ST. LOUIS, VANDALIA AND TERRE HAUTE RAILROAD COMPANY
vs.
TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY. } In Chancery.

Be it remembered that heretofore, to wit, on the sixth day of July, A. D. 1887, came the complainant, St. Louis, Vandalia and Terre Haute Railroad Company, a corporation organized and existing under the laws of the State of Illinois, by Messrs. Trumbull, Robbins & Trumbull, and J. T. Brooks, its solicitors, and filed in the clerk's office of said court its bill of complaint against the Terre Haute and Indianapolis Railroad Company, a corporation organized and existing under the laws of the State of Indiana, which said bill is in the words and figures following, to wit:

2 *Bill of Complaint.*

UNITED STATES OF AMERICA, *Southern District of Illinois,* } *ss:*

In the United States Circuit Court for the Southern District of Illinois, in Chancery Sitting.

To the honorable judges of the circuit court of the United States for the southern district of Illinois:

The St. Louis, Vandalia & Terre Haute Railroad Company brings this its bill against the Terre Haute & Indianapolis Railroad Company; and thereupon your orator, The St. Louis, Vandalia & Terre Haute Railroad Company, complains and says:

First. That it is a corporation duly organized and existing under and by virtue of the State of Illinois, a citizen of said State, and a resident of the southern district thereof, and that said defendant, The Terre Haute & Indianapolis Railroad Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Indiana and a citizen of the State of Indiana.

Second. Your orator further shows that your orator was originally created a corporation of said State of Illinois by an act of the General Assembly thereof passed and in force the 10th day of February,

1865, entitled "An act to incorporate the St. Louis, Vandalia & Terre Haute Railroad Company, which act of incorporation was subsequently amended by said General Assembly by an act passed and in force on the 8th day of February, 1867, entitled An act to amend an act entitled An act to incorporate the St. Louis, Vandalia & Terre Haute Railroad Company;" by which act and amendment
3 thereof your orator was empowered authorized to locate, construct, furnish, and maintain a railroad, commencing on the left bank of the Mississippi river, opposite St. Louis, running thence easterly through Greenville, the county seat of Bond county, and through Vandalia by the most eligible route to a point on the Wabash river which it might deem the most convenient for extending the same to the city of Terre Haute, in the State of Indiana: Provided, however, That if your orator should find it practicable to reach the west bank of the Wabash river for its eastern terminus, as above provided, it should be lawful for it to make the State line at any practicable point in the direction of said city of Terre Haute, in said State of Indiana, its eastern terminus. And your orator was further authorized and empowered by said act and the amendment thereto to establish, take, and receive such rates of tolls for passengers and property conveyed or transferred upon said road, when constructed, as the directors of your orator should from time to time establish; also to borrow money from time to time for the purpose of constructing said road and furnishing the same with cars, locomotives, etc., necessary to carry on the operation of your orator and to issue its corporate bonds therefor. By the said acts aforesaid it was further provided that the capital stock of your orator should be three million dollars ($3,000,000.00), which might be thereafter increased by a vote of the majority of the stockholders; that said capital stock should be divided into shares of one hundred dollars each, and that your orator should annually or semi-annually make such dividends as it might deem proper of the net profits, receipts,
4 or income of your orator among its stockholders in proportion to their respective shares of stock; and said acts further conferred upon your orator all the rights, privileges, powers, and immunities commonly given to or exercised and enjoyed by railroad companies in said State of Illinois, whether the same were directly expressed in said acts or not; but by neither of said acts, nor by any rights, privileges, and powers commonly given to or exercised and enjoyed by railroad companies in the State of Illinois, was your orator authorized to lease its railroad, or by any other contract or conveyance to part with the entire possession, control, and use of its property and franchises, or to deprive itself of and vest in others the power of control in the management of its said road and other property and in the exercise of its franchises, including the right to impose and collect tolls for the transportation of passengers and freight indefinitely or for any fixed period of time; all of which matters and things will more fully and at large appear by reference to copies of said acts, hereto attached and marked, respectively, Exhibits "A" and "B," and which your orator prays may be taken as

parts of this bill as fully as if the same were here particularly set out.

Third. Your orator further shows that said defendant, The Terre Haute and Indianapolis Railroad Company, was originally created a corporation, under the name of the Terre Haute and Richmond Railroad Company, by an act of the General Assembly of the State of Indiana, passed January 26th, 1847, entitled "An act to incorporate the Terre Haute and Richmond Railroad Company," with full power and authority to locate and construct a railroad track commencing at some point on the western line of the State of Indiana and running on the best ground for the interest of the company, defendant, and public convenience, eastwardly through Terre Haute to Richmond, in said State of Indiana; and by said act it was further provided that the capital stock of said defendant should be eight hundred thousand dollars ($800,000.00), divided into shares of fifty ($50) dollars each, with power to said defendant to increase the same, and that afterwards said General Assembly of said State of Indiana, by an act passed on the sixth day of March, 1865, entitled "An act to change the name of the Terre Haute and Richmond Railroad Company, and to give further time for the completion of the line of said road from Terre Haute to a point on the western line of the State of Indiana," changed the name of the said defendant from the Terre Haute and Richmond Railroad Company to the Terre Haute and Indianapolis Railroad Company, but that neither by said original act of incorporation nor said amending act, nor by any law of the said State of its incorporation, was or is said defendant authorized to make, execute, or accept any lease, contract, or other conveyance by which it, the said defendant, should acquire or obtain, either indefinitely or for a fixed term, the ownership, management, or control of any railroad located beyond the limits of said State of Indiana, as will more fully and at large appear by reference to copies of said acts hereto attached and marked respectively, Exhibits "C" and "D," and which your orator prays may be taken as parts of this bill as fully as if the same were particularly set out.

Fourth. Your orator further shows that shortly after the passage of said act of the tenth day of February, 1865, its capital stock was duly subscribed for, and it proceeded as therein and in said amending act authorized to contract a line of railroad from the city of East St. Louis to a point on the eastern boundary of the State of Illinois, through the following counties, to wit, St. Clair, Madison, Bond, Fayette, Effingham, Cumberland, and Clark, and the towns of Greenville and Vandalia, the length of said line of road being one hundred and fifty-eight miles, more or less, and on or about the first day of July, 1870, completed said line of railroad, together with such wood, water, passenger, and freight stations, buildings, shops, fixtures, sidings, and other appurtenances as were necessary for the convenient and profitable operation of the same, and also, on or about the date last aforesaid, equipped and furnished the railroad with the necessary locomotives, cars, and other rolling stock required to successfully operate said line of road.

Fifth. Your orator further shows that, for the purpose of constructing said road and furnishing the same with cars, locomotives, and other machinery necessary to carry on the operation thereof, your orator, on or about the sixth day of April, 1867, duly made and executed, under your orator's corporate seal, attested by your orator's president and treasurer, as duly authorized by your orator's board of directors, and delivered to Joseph T. Thomas, your orator's certain indenture of mortgage or deed of trust, bearing date the first day of January, 1867, whereby your orator mortgaged and conveyed in trust to said Thomas, as trustee, your orator's said line of railway and the said appurtenances and equipments
7 thereof in order to secure the payment of the principal and interest of a certain then contemplated issue of bonds of your orator to the aggregate amount of $1,900,000.00 in bonds of not less than $500.00 each, to be dated the said first day of January, 1867, and payable thirty years thereafter, with interest at the rate of seven per cent. per annum, payable semi-annually on the first days of January and July in each year, by which indenture it was, among other things, further provided that for the further security and ultimate redemption of the aforesaid bonds your orator, its successors or assigns, would, on or before the first day of July in each year until the principal of said bonds should be wholly paid, beginning on the first day of July, 1872, set apart and appropriate out of the earnings of said railroad and on or about said day deposit with and pay to a commissioner, to be hereafter appointed by your orator, the full sum of twenty thousand dollars ($20,000.00), which sum, together with all accumulations of interest thereon that might actually come into the hands of said commissioner, should be invested by him in the purchase of the bonds in said indenture designated, if the same could be purchased at the par value thereof and interest, and, if not, in the purchase of such other bonds or securities as your orator and said Thomas might direct, giving preference, however, to the securities of the United States of America; and by said indenture it was further provided that in case of default in the payment of any of the interest or principal of said bonds as the same should become payable, or in case of a failure of your orator to make the yearly payments of twenty thousand dollars into the sinking fund,
8 as in said indenture required, and the continuance of said default for a period of six months thereafter, it should be lawful for said trustee, and upon the request in writing by a certain number of said bondholders in said indenture specified, it should be the duty of said trustee to make entry upon, or without entry, to sell and dispose of all and singular the premises and property in said indenture conveyed, and the equity of redemption of your orator, its successors or assigns, therein, at public auction, in the manner prescribed in said indenture, and, upon said sale, to make and deliver to the purchaser or purchasers thereof good and sufficient deed or deeds in law for the same, which sale, when made, should be a perpetual bar, both in law and equity, against your orator, its successors and assigns, and all persons claiming said property by, from, under, or through your orator or them, and to apply the proceeds

of said sale, after deducting the expenses thereof, or so much of said proceeds as might be necessary to the payment of the principal and interest of said bonds, whether said principal was then due or not. It was further provided in said indenture that in the mean time, and until default should be made in the payment of the principal and interest of said bonds or some of them or some of the covenants and agreements in said indenture contained, it should be lawful for your orator and its successors and assigns, peaceably and quietly, to have, hold, use, possess, and enjoy said premises and appurtenances in said indenture mentioned, and to operate and maintain the said railroad and property, and to receive the incomes, tolls, rents, issues, and profits thereof to their own use and benefit, without any hindrance or interruption by suit or disturbance whatever, or by
9 said Joseph T. Thomas, trustee, his successors in trust, or any other person or persons claiming by, through, or under him, all of which matters and things will more fully and at large appear by reference to a copy of said indenture, hereto attached, marked Exhibit "E," and which your orator prays may be taken as a part of this bill as fully as if the same was particularly set out.

Sixth. Your orator further shows that, for the purpose of constructing said road and furnishing the same with cars, locomotives, and other machinery necessary to carry on the operation thereof, your orator, on or about the 13th day of March, 1868, duly made and executed, under its corporate seal, attested by your orator's president, as duly authorized by your orator's board of directors, and delivered to J. Edgar Thompson and Chauncy Rose, your orator's certain other indenture of mortgage or deed of trust, bearing the date last aforesaid, conveying to said Thompson and Rose, as trustees, its said line of said railway and appurtenances thereof in order to secure the payment of the principal and interest of a certain then contemplated issue of the bonds of your orator to the aggregate of $2,600,000.00, said bonds to be in sums of ($1,000.00) one thousand dollars each, to be dated of even date with said indenture and payable thirty years after the first day of May, 1868, with interest at the rate of seven per cent. per annum, payable semi-annually on the first days of May and November in each year, and by said indenture it was further provided that if there should be any default in the payment of either the principal or interest of any of said bonds according to their terms, and such default continue for the period of six months thereafter, it should be lawful for
10 and, upon the request of the holder of a certain amount of said bonds in said indenture specified, it should be the duty of said trustees to make entry upon or without entry to sell and dispose of all and singular the premises in said indenture conveyed or intended to be conveyed, and all right, benefit, and equity of redemption of your orator, its successors or assigns, at public auction, at the place and in the manner in said indenture designated, and to make and to deliver to the purchaser or purchasers thereof a good and sufficient deed or deeds in fee simple for the same, which sale, when made, should be a perpetual bar in law and equity against your orator, its successors and assigns, and all persons claim-

ing by, through, or under your orator or them, to apply the proceeds of said sale, after deducting the just allowances for expenses — attorneys' fees, or so much thereof as might be necessary, to the payment of the interest and principal, whether said bonds be by their terms then due or not; and it was further provided in said indenture that in the mean time and until default should be made in the payment of the principal or interest of said bonds or of some part thereof, or of some of the covenants or agreements of your orator in said indenture contained, it should be lawful for your orators and its successors and they should have the right to peaceably and quietly to have, hold, use, possess, and enjoy said rights and property, franchises, premises, and appurtenances in said indenture mentioned, and to operate and maintain said railroad and property and to receive the income, toll, rents, issues, and profits thereof to your orator's own use and benefit, without any hindrance or interruption, suit or disturbance, — their successors in trust
11 or any other person lawfully claiming by, through, or under them or their successors or either of them; all of which matters and things will more fully and at large appear by reference to a copy of said indenture hereto attached and marked Exhibit "F," and which your orator prays may be taken as a part of this bill as fully as if the same were particularly set out.

Seventh. Your orator further shows that after the two indentures of mortgage or deeds of trust heretofore mentioned in articles five and six of this bill were executed by your orator the same were delivered to the said trustees therein named, respectively, the trusts thereof duly excepted by them, respectively, and thereafter the said two indentures were duly recorded according to law in the several counties of the said State of Illinois through or in which your orator's said line of railroad or any part thereof is situate, so as to make the same a valid lien thereon; said indenture, dated the 1st day of January, 1867, was duly recorded in all of said counties on or before the 12 day of June, 1867, and said indenture, dated the 13th day of March, 1868, was duly recorded in Clarke county on the 27th day of May, 1868, and in all of the other said counties on or before the 13th day of May, 1879; that after the execution of said indenture aforesaid the bonds of your orator therein referred to, aggregating $4,500,000.00, were duly executed and disposed of by your orator for a full and valuable consideration to divers persons and the proceeds thereof applied to the construction and equipment of said railroad; that none of said bonds have been since paid, nor has there been created nor now existing any sinking fund as
12 provided in said indenture, dated the 1st day of January, 1867, but all of said bonds are still outstanding and unpaid, in the hands of divers persons, and are subsisting obligations of your orator, and that said two indentures, given as aforesaid to secure the payment of said bonds, have not been in any way released or discharged, but are now subsisting liens upon the property of your orator for the purposes therein set forth.

Eighth. Your orator further shows that prior to the completion of its said road as aforesaid and on or about the 10th day of Febru-

ary, 1868, one J. F. Alexander, who was at that time the president of your orator, acting under the authority which he then assumed or attempted to confer upon him, executed with said defendant a pretended lease, which is the words and figures following, to wit:

Whereas a contract for the construction and equipment of the St. Louis, Vandalia & Terre Haute railroad, belonging to a corporation of the State of Illinois, has been entered into this day, by which arrangements have been made to complete and equip said road between East St. Louis and the State line of Indiana in the manner set forth in said contract;

And whereas the Terre Haute and Indianapolis Railroad Company, a corporation of the State of Indiana, has proposed to construct without delay a first-class railroad, being an extension of their present road from Terre Haute to the State line of Indiana, upon such location as will connect properly and directly with the St. Louis, Vandalia and Terre Haute railroad at the State line of Illinois;

And whereas it is desirable that the said lines when connected should be operated by the Terre Haute and Indianapolis
13 Railroad Company as one road between Indianapolis and St. Louis, and the said Terre Haute and Indianapolis Railroad Company having proposed to lease and operate the said St. Louis, Vandalia & Terre Haute railroad for a period of nine hundred and ninety-nine years: It is therefore agreed, first—

That upon the completion of the road between East St. Louis and the State line of Indiana, the Terre Haute and Indianapolis Railroad Company shall take charge of and operate the same with its equipment for a period of 999 years, for which they shall be allowed sixty five per cent. of the gross receipts from all traffic moved over the line or business done thereon and from the property of the company, as a consideration for working and maintenance expenses, the remaining thirty five per cent to be appropriated as follows:

1st. To the payment of interest on the first and second mortgage bonds of the St. Louis, Vandalia and Terre Haute Railroad Company according to their legal priority.

2nd. All the surplus of said 35 per cent. to be paid over to the St. Louis, Vandalia & Terre Haute Railroad Company (semi-annually), to be disposed of by it for the benefit of its stockholders. If the 35 per cent. should from any cause not be sufficient in amount to protect the interest on mortgage bonds and sinking funds therefor as they mature from time to time, together with the payment of taxes and proper cost of maintaining organization, so that the rights of stockholders may be preserved, then and in that event the lessee shall advance for the company whatever amounts may be needed, to be accounted for under the yearly averages of this lease during this contract.

14 It is further agreed that the Terre Haute and Indianapolis Railroad Company as lessee shall enjoy all the rights, powers, and privileges of the St. Louis, Vandalia & Terre Haute Railroad Company, so far as the same may be needful to maintain and oper-

ate said railroad; also to impose and collect tolls and rates for transportation, and do all other acts and things as fully and as effectually as the said St. Louis, Vandalia & Terre Haute Railroad Company could do if operating said line, it always being understood and agreed that the gross proceeds from through or joint traffic or business shall be divided on the *pro rata* basis per mile for distance moved on the road of each party.

In witness whereof the parties have respectively hereunto affixed, this the 10th day of February, A. D. 1868, their official signatures and seals under authority of their boards of directors.

[Seal St. L., V. & T. H. R. R. Co.]

THE ST. LOUIS, VANDALIA & TERRE HAUTE RAILROAD COMPANY,
(Signed) By J. F. ALEXANDER, *President.*

[Seal T. H. & I. R. R. Co.]

THE TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY,
By W. R. McKEEN, *President.*

Sealed and delivered in presence of—
E. F. WINSLOW.

That the first and second mortgage bonds of your orator, referred to in said pretended lease, are the same bonds secured by the said two indentures set forth in articles five and six of this bill, and that afterwards, on or about the 12th day of January, 1869, the then board of directors of your orator passed a certain resolution, wherein and whereby they undertook to authorize the president of your orator to change the terms of said lease so that where "sixty-five per cent. of the gross receipts" occurs therein it should read "seventy per cent.," but that if the working and maintenance expenses of said railroad should be less than seventy per cent. of the gross receipts aforesaid, then all of such excess should be paid over to your orator, as will more fully and at large appear by reference to a copy of said resolution, hereto attached and marked Exhibit "G," and which your orator prays may be taken as a part of this bill as fully as if the same was particularly set out, which said modification was thereafter assented and agreed to by said defendant.

Ninth. Your orator further shows that at the time of the execution and delivery of said pretended lease there was in force in said State of Illinois an act of the General Assembly thereof, passed February 16th, 1865, whereby it was enacted that "it shall not be lawful for any railroad company of Illinois, or for the directors of any railroad company of Illinois, to consolidate their road with any railroad out of the State of Illinois, or to lease their road to any railroad company out of the State of Illinois, or to lease any railroad out of the State of Illinois without having first obtained the written consent of all the stockholders of said roads residing in the State of Illinois, and any contract for such consolidation or lease which may be made without having first obtained said written con-

sent, signed by the resident stockholders in Illinois, shall be null and void, as will more fully and at large appear by reference to a copy of said act, hereto attached and marked Exhibit "H."

And your orator avers that at the time of the execution of
16 said pretended lease a large number of the stockholders of your orator were resident in the said State of Illinois, among whom were the following persons, then residing at the various places named, as follows:

Smith & Son, Greenville, Illinois.
M. B. Chittenden, " "
George W. Hill, " "
A. G. Henry, " "
D. H. Kingsbury, " "
James McFerrin, " "
John A. McNeely, " "
Joseph McCully, " "
S. P. Moore, " "
B. F. Mayo, " "
Andrew Rea, " "
William S. Smith, " "
Henry W. Waite, " "
Richard S. Waite, " "
Foster R. Waite, " "
George Winters, Marshall, Illinois.
W. C. Whitlock, " "
Thomas Turner, " "
William Shaw, " "
R. R. Scott, " "
Dean Andrews, " "
A. B. Briscoe, " "
Lyman Booth, " "
J. R. Crosley, " "
G. W. Cooper, Marshall, Illinois.
17 Thomas Cole, Marshall, Illinois.
James Dawson, " "
C. & G. Duncan, " "
R. L. Dulaney, " "
Martin Flener, " "
David Guard, " "
John Gamble, " "
Justin Harlan, " "
William Kimlin, " "
Darius Legore, " "
E. B. Moore, " "
Jonathan Rains, " "
William Redick, " "
John Scofield, " "
Henry Wembeimer, Highland, Illinois.
Joseph Harnish, " "
Lorenz Marxer, " "
Francisco Pendzniska, " "

Charles H. Seybt, Highland, Illinois.
Benjamin Brown, Pocahontas, Illinois.
Mrs. A. S. Johnson, " "
W. F. Brattner, " "
Charles Pickering, " "
Mrs. L. Redfeam, " "
Leo Waite, " "
Mrs. Mary C. Todd, East St. Louis, Illinois.
Town of Vandalia, Illinois.
Bond county, Illinois.
18 Jacob Eremer, Collinsville, Illinois.
Joshua S. Peers, " "
Martin Ruch, Saline, Illinois.
Lewis S. Seaman, Shelbyville, Illinois.
Fritz Pagan, Highland, Illinois.
David Goebel, Pocahontas, Illinois.

And that neither at the time of the execution of said lease nor at any subsequent time did all of said stockholders resident in said State of Illinois consent, in writing, to the execution of said pretended lease aforesaid, nor did said stockholders of your orator, at any stockholders' meeting, held either before or subsequent to the execution of said pretended lease, authorize, confirm, or ratify the execution thereof.

Tenth. Your orator further shows that after the execution of said pretended lease, and as soon as the construction and equipment of said road of your orator had been completed as aforesaid, and on or about the 1st day of July, 1870, the said defendant, claiming the right so to do by reason of and under said pretended lease, entered into possession, assumed and took the complete control and use of all of your orator's said railroad, together with all its wood, water, passenger, and freight stations, buildings, fixtures, shops, sidings, and other appurtenances, and also its locomotives, cars, and other rolling stock, machinery, tools, and other utensils and equipments, and all other property of your orator of whatsoever name, nature, kind, and description, and said defendant has from that time continuously to the present day retained and still retains the exclusive possession and control thereof, and from the time when it so took possession of
19 your orator's said property as aforesaid said defendant has been continuously and now is exercising all the rights, powers, and privileges of your orator under its said franchises, and has been and now is maintaining, operating, managing, and controlling your orator's said railroad and other property and imposing, collecting, and receiving tolls and rates accruing for the transportation of passengers and freight over your orator's said road, and that the sum so received by said defendant and appropriated to its own use and that of its stockholders from the tolls and other receipts of your orator's said property, franchises, rights, powers, and privileges now aggregate more than $21,600,000.

Eleventh. Your orator further shows that it is advised by counsel that said defendant in executing and accepting said pretended lease and in taking possession of and operating under said pre-

tended lease said railroad and other property, rights, powers, and privileges of your orator exceeded the powers and rights conferred upon it by its charter and the laws of the State of Indiana and acted wholly without authority of law or right.

And your orator is further advised by counsel that neither said Alexander, as the president of your orator, nor the board of directors of your orator that was in existence at the time of the execution of said pretended lease nor any other board of directors of your orator nor your orator had at the time of the execution of said pretended lease, nor at any other time, power and authority to execute a lease of its property as in said pretended lease contemplated, nor could your orator, either through its said president or its said board
20 of directors nor otherwise, make any conveyance or contract whereby it could for a term of years or indefinitely part with the complete possession, control, and use of your orator's said property and franchises, or whereby it could for a like period transfer to the defendant or any other non-resident corporation all its rights, powers, and privileges so far as the same might be needful to operate and maintain said railroad or its right to impose and collect tolls and rates for transportation, and do all other acts and things incident to the operation of said railroad, and that said pretended lease for 999 years is an attempt on the part of your orator to part with and divest itself of the entire possession and control of the property and franchises of your orator, including all its rights, privileges, powers, and immunities incident to the management and control of its said property for such an extended period of time as virtually amounts to a sale in perpetuity and to an absolute surrender of its property and practical surrender of its entire franchise to a corporation foreign to the State of Illinois, and incapacitates your orator from fulfilling those duties and obligations to the said State of Illinois and the inhabitants thereof which are imposed upon it by the acceptance of its charter, which neither your orator nor any of its officers or directors could lawfully do.

And your orator is further advised, even if either your orator or its said officers or directors could lawfully execute such a contract or conveyance as said pretended lease, that said pretended lease was not executed in the manner in which alone such a lease could be executed under the laws of the State of Illinois, and that said
21 pretended lease is absolutely null and void and in no way binding upon your orator or said defendant.

Twelfth. Your orator further shows that said defendant, by taking possession as aforesaid of your orator's railroad and property without right as aforesaid, became in equity a trustee of your orator, and as such was and is liable in equity to account to your orator for all such property and all the tolls and issues, emoluments, and receipts, of whatever name and nature, said defendant has or ought to have in any way collected or received from the possession, control, operation, and management of your orator's property and road aforesaid, and to restore immediately to the possession and control of your orator all said property now remaining in the possession or under the control of said defendant, and to pay over to your orator all of

said receipts aforesaid, after deducting therefrom said defendant's reasonable disbursements in and about the care, management, operation, and maintenance of your orator's aforesaid railroad and property, and also such further sum as shall be the fair value or equivalent of so much of said property, if any, as said defendant has no longer in its possession or control.

Thirteenth. Your orator further shows that heretofore at various times it has requested of the said defendant that it, said defendant, turn over to your orator your orator's said railroad and such other property so taken possession of by said defendant aforesaid as it had in its possession or control, but that said defendant has failed and refused and still refuses to comply with your orator's said reasonable request, and insists upon the validity of said pretended lease and upon its right during said entire period of 999 years, men-
22 tioned in said lease, to retain the possession of, operate, control, and receive the income for its own interest and use of said property so unlawfully retained by said defendant from your orator, and to enjoy all the rights, powers, and privileges of your orator under its franchise, so far as the same shall be needful to maintain and operate said railroad; and said defendant, while insisting upon the validity of said pretended lease, has failed during said entire — it has had possession and control of your orator's said property and still refuses to account for or pay over to your orator, according to the terms of said pretended lease as modified as aforesaid, your orator's share of said gross receipts in said pretended lease mentioned which remained after the payment of the interest accruing on the mortgage bonds of your orator hereinbefore mentioned, and your orator avers that such share, after deducting therefrom all sums supplied by said defendant to the payment of taxes upon your orator's said railroad and other property aforesaid or otherwise improperly expended by said defendant for the benefit and advantage of your orator, amounts to the sum of more than $500,000.00, and that by reason of the failure of said defendant to account or to pay over to your orator said monies or any part thereof, and because said defendant has in its possession and control all of your orator's property of every kind and your orator has no other source of revenue, your orator has been unable to apply any money whatever to the creation of a sinking fund, as required by it by said indenture of mortgage or deed of trust dated the 1st day of January, 1867, and said defendant has failed and refuses to advance any portion
23 of the amount needed for the purposes of said sinking fund, as required by said pretended lease.

Fourteenth. Your orator further says that it has no doubt that when said board of directors of your orator existing at the time of making of said pretended lease authorized the execution of, and said Alexander, the then president of your orator, executed, said pretended lease as aforesaid they supposed that your orator and they, on its behalf and as its directors and officers, had the lawful right to authorize the execution of and execute the same, and your orator did not know until recently that said lease was null and void, and that your orator through its said directors and officers and by the

execution of said pretended lease had violated the law and exceeded its powers, and for this reason your orator has not heretofore instituted legal proceedings for the purpose herein sought; but your orator has been recently advised by its counsel that such lease is null and void, and that it is the duty of your orator at once to repudiate this pretended lease and to resume the possession, control, and use of its said property and franchises, and thereby at once place itself in a position to fulfil, perform, and discharge those duties and obligations to the public which your orator assumed by the acceptance of its charter.

Fifteenth. Your orator further says that great and irreparable injury will be done your orator and its stockholders unless your orator be restored to the immediate possession, control, and use of the said property, powers, rights, and franchises and have the other relief herein prayed; that it is advised by its counsel that by the execution of said pretended lease it has rendered itself liable
24 to have its charter and corporation rights taken from it by the State of Illinois for an abuse of its franchise; that its said railroad and other property is of great value, exceeding the sum of $8,500,000.00, and yields a large annual income, which income, under careful and prudent management could be largely increased; that the present net income of said railroad is more than sufficient to pay the interest on its bonded indebtedness and to comply with the requirements of said first-mortgage indenture, dated the 1st day of January, 1867, concerning the creation of a sinking fund; that by reason of this failure to provide for a sinking fund the bondholders secured by said first mortgage may at any time institute proceedings to foreclose the same, and thereby *through* the affairs of your orator into great confusion, and your orator thereby be brought into a state of insolvency. Your orator further avers, upon the advice of counsel, that if said defendant is permitted to remain in the possession and control of the said railroad and appurtenances and to receive the earnings of the same under said *ultra vires* contract of lease your orators have no means of enforcing the provisions of the same against the said defendant, and that to allow said defendant to avail himself of said *ultra vires* contract of lease, which cannot be enforced against it, is doing your orator an irreparable injury, even if it could compel the said defendant under an implied obligation to account for the profits derived from the possession, use, and control of your orator's railroad and appurtenances.

Sixteenth. Your orator further says that whether said pretended lease be adjudged valid or void the protection and enforcement of the rights of your orator in the premises demand the
25 taking of an account between your orator and said defendant of the monies received by said defendant in the operation of your orator's said railroad, etc.; that this will require the investigation of long and complicated accounts covering a period of nearly seventeen years, the expenditure and receipt of large sums of money, and involves a great many separate items and accounts, and if said pretended lease be null and void, as your orator claims, your orator is entitled to have said defendant account also for the

property of your orator so taken as aforesaid by said defendant under said pretended lease, and a court of law affords no adequate means for taking of either of such accounts, and that said pretended lease be null and void and still outstanding and claimed by said defendant to be valid is and, unless delivered up and cancelled, will continue to be a cloud upon the title of your orator to its said property during the entire period covered by said pretended lease, and such cloud is liable to seriously embarrass your orator in the ownership and use of its said property, and a court of law has no jurisdiction adequate to direct a surrender and cancellation of said pretended lease; that said defendant is a non-resident of this district and State and has no property therein out of which your orator could secure satisfaction of any decree or judgment obtained in this court; that large sum of monies are daily accruing from tolls and charges in the operation of your said orator's railroad, which are being collected and received by said defendant, by reason of its having possession of said road, and are being withdrawn by said defendant from the jurisdiction of this court; that said de-
26 fendant will continue during the litigation concerning the said pretended lease to collect and appropriate to its own use and withdraw from the jurisdiction and reach of the process of this court such large emoluments and tolls as will accrue during the said litigation, to the great and irreparable injury of your orator, unless the possession of said railroad and other property shall be restored to your orator and said defendant shall be restrained from further interfering therewith by the injunction of this court, or a receiver shall be appointed to take possession and control of said property, operate said railroad, and receive the tolls and emoluments therefrom *pendente lite*. In tender consideration whereof, and forasmuch as your orator is remedilses in the premises at and by the strict rule of the common law, and is relievable only in a court of equity, where matters of this nature are properly relievable, to the end thereof that your orator may have the relief herein prayed, and that said Terre Haute & Indianapolis Railroad Company, the defendant herein, may answer make (but not under oath, answer under oath being hereby waived); and,

I. First. That by the decree of this court the said pretended lease may be declared to be null and void, and that the said defendant be decreed to cancel and surrender the same to your orator.

Second. That said defendant be decreed to yield and deliver to your orator said road and said other property of your orator so taken possession of by said defendant under said pretended lease, or so much thereof as shall, upon the filing of this bill, be in the possession or under the control of said defendant, together with
27 any and all equipment belonging to your orator's said railroad, whether originally delivered to defendant under said pretended lease or subsequently acquired to replace equipment worn out or destroyed, and that thereafter said defendant be perpetually restrained by the injunction of this court from interfering with or

disturbing your orator in its possession, control, and operation of said railroad and other property.

Third. That an account may be taken, by and under the direction of this honorable court, of the amounts which said defendant has received or might have received, by due skill and diligence, from the use, operation, control, and management of the said railroad and other property of your orator so attempted to be demised by said pretended lease from the time said defendant acquired possession and control thereof to the time of the surrender of the same to your orator or the receiver appointed herein; that an account be taken of the reasonable expense and disbursements necessarily expended by said defendants in the operation and maintenance of the said railroad and other property aforesaid, and that said defendant be decreed to pay to your orator the amount so found to have been received by it as aforesaid, together with the fair value of such of the aforesaid property, if any, as shall not be in the possession or control of said defendant at the time of the filing of this bill, less defendant's said reasonable disbursements and expenses.

Fourth. That if said lease shall, in the opinion of this court, be valid an accounting may then be taken, under the direction of this court, of the amount due from said defendant to your
28 orator under said lease, and that defendant may be decreed to pay to your orator said amount so found to be due.

Fifth. That said defendant, its officers, agents, attorneys, and servants, by the writ of injunction issued out of this court, be restrained during the pendency of this suit, and until the final determination thereof, from collecting or receiving any of the tolls or emoluments accruing from the operation or use of your orator's said railroad or other property, or from interfering in any manner whatever with the management and control thereof by your orator, or its possession of said railroad and other property, or that a receiver, *pendente lite*, be appointed by this court to take possession of said railroad and other property, with power to operate and maintain the same, collect the tolls and other receipts therefrom, and with the usual powers of receivers in such cases.

Sixth. And that your orator may have such other and further relief in the premises as to the court shall seem meet and equity may require, etc.

May it please your honors to grant unto your orator a writ of subpœna, to be directed to the said Terre Haute and Indianapolis Railroad Company, thereby commanding it, at a certain time and under a certain penalty therein to be limited, personally to appear before this honorable court and then and there full, true, direct, and perfect answer make to all and singular the premises, and further to stand to, perform, and abide such further order, di-

rection, and decree therein as to this honorable court shall seem meet, etc., etc.

THE ST. LOUIS, VANDALIA & TERRE HAUTE RAILROAD COMPANY,
By THOS. D. MESSLER, *President.*

[SEAL.] Attest: S. B. LIGGETT, *Secretary.*

29 J. T. BROOKS,
Solicitor for Complainant.
TRUMBULL, ROBBINS & TRUMBULL,
Of Counsel for Complainant.
McDONALD, BUTLER AND MASON,
Of Counsel for Complainant.

STATE OF PENNSYLVANIA, } ss:
County of Allegheny, }

Before me, the undersigned authority, personally came Thomas D. Messler, to me known as the president of the St. Louis, Vandalia and Terre Haute Railroad Company, and upon oath declares that he has heard read the foregoing bill of complaint and knows the contents thereof, and that in so far as the statements therein contained are made of his own knowledge the same are true, and, so far as the same are made upon information and belief, he believes the same to be true.

THOS. D. MESSLER.

Sworn to by the said Thomas D. Messler and by him subscribed in my presence this twenty-second day of June, in the year of our Lord eighteen hundred and eighty-seven.

[SEAL.] M. H. SHANE,
Notary Public.

(Endorsed:) Filed July 6th, A. D. 1887.
JAMES T. JONES, *Clerk.*

NOTE.—Exhibits to this bill are the same as those hereinafter set forth as exhibits to amended bill.

JAMES T. JONES, *Clerk.*

30 Whereupon a writ of subpœna was issued as prayed for, directed and delivered to the marshal of said district to execute; which said writ, together with the return of the marshal thereto, is in the words and figures following, to wit:

Subpœna.

UNITED STATES OF AMERICA, } ss:
Southern District of Illinois, }

The United States of America to the Terre Haute and Indianapolis Railroad Company, Greeting:

We command you and every of you that you appear before our judges of our circuit court of the United States of America for the

southern district of Illinois, at Springfield, in said district, on the first Monday in the month of August next, to answer the bill of complaint of the St. Louis, Vandalia and Terre Haute Railroad Company, this day filed in the clerk's office of said court, in said city of Springfield, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the southern district of Illinois to execute.

31 Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Springfield aforesaid, this sixth day of July, in the year of our Lord one thousand eight hundred and eighty-seven, and of our Independence the one hundred and twelfth year.

[L. S.] JAMES T. JONES, *Clerk.*

MEMORANDUM.—The above-named defendant is notified that unless it shall enter its appearance in the clerk's office of said court, at Springfield aforesaid, on or before the day to which the above writ is returnable the complainant's bill will be taken against it as confessed and a decree entered accordingly.

JAMES T. JONES, *Clerk.*

Notice for Receiver & Injunction.

Circuit Court of the United States, Southern District of Illinois, ss.
In Chancery.

ST. LOUIS, VANDALIA AND TERRE HAUTE RAILROAD COMPANY
vs.
TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY.

32 To the Terre Haute and Indianapolis Railroad Company:

Take notice that the complainant will move this honorable court, on the 14th day of July, A. D. 1887, or as soon thereafter as counsel can be heard, for the appointment of a receiver, and that a writ of injunction issue against the within and above-named defendant in accordance with the prayer of the bill therein.

Yours, etc.,

TRUMBULL, ROBBINS & TRUMBULL,
Of Counsel for Compl't.

Dated this 6th day of July, 1887.

Return of Marshal.

Served the within writ and notice on the within-named defendant, The Terre Haute and Indianapolis Railroad Company, by reading the same and also delivering a true copy thereof to F. W. Bland, cashier of the within-named defendant, at East St. Louis, Illinois, on the seventh (7th) day of July, A. D. 1887, the president of the

within-named defendant, The Terre Haute and Indianapolis Railroad Company, not found in my district.

H. G. WEBER,
U. S. Marshal, Southern District of Illinois.
By GEO. W. SCHUESSLER, *Deputy.*

(Indorsed:) Filed July 21, A. D. 1887. James T. Jones, clerk.

33 Afterwards, to wit, on the fourteenth day of July, in the year last aforesaid, came the defendant, by its solicitors, and filed in the clerk's office of said court the affidavit of William R. McKeen; which said affidavit is in the words and figures following, to wit:

34 *Affidavit of Wm. R. McKeen.*

In the Circuit Court of the United States for the Southern District of Illinois. In Equity.

THE ST. LOUIS, VANDALIA & TERRE HAUTE RAILROAD COMPANY
vs.
THE TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY.

William R. McKeen, being duly sworn, upon his oath deposes and says—

That he is now, and for more than thirty (30) years last past has been, a resident of the city of Terre Haute, Indiana.

That in January, 1867, he was elected president of the Terre Haute & Indianapolis Railroad Company, the defendant herein, and immediately assumed the duties of that office; that at each annual election of officers of said company after January, 1867, he was re-elected president of said company and continued to discharge the duties of said office until the 4th day af June, A. D. 1887, when he resigned; that at the time he became president as aforesaid the line of railroad owned and operated by said Terre Haute & Indianapolis Railroad Company only extended from Indianapolis, Indiana, to the city of Terre Haute aforesaid, a distance of about seventy-three (73) miles, and the only railroad at that time leading west from Terre Haute was the St. Louis, Alton & Terre Haute railroad, then leased to the Indianapolis & St. Louis Railroad Company, and extending from Terre Haute through Paris, Mattoon, Pana, and Litchfield, in the State of Illinois, to the Mississippi river at East St. Louis, Illinois.

That the said Terre Haute & Indianapolis Railroad Company was at that time the only railroad leading east from said city of Terre Haute, and the said St. Louis, Alton & Terre Haute railroad was the only road with which it could exchange east and west bound
35 business; that extending eastward from Indianapolis, Indiana, four connecting lines of railroad connected said last-named city with the city of New York, to wit, the Columbus, Chicago & Indiana Central Railway Company, extending from Indianapolis to Columbus, Ohio; the Steubenville & Indiana Railroad Company, extending from Columbus to Steubenville, Ohio; the Pan Handle

Railroad Company, extending from Steubenville to Pittsburgh, Pennsylvania; the Pennsylvania Railroad Company and its leased lines, extending from Pittsburgh via Philadelphia to Jersey City, New Jersey; that the complainant herein about that time had commenced the construction of its railroad, beginning at East St. Louis, in the State of Illinois, and had completed between twenty and twenty-five miles thereof in an easterly direction from East St. Louis; that Benjamin E. Smith was then president of said Columbus, Chicago & Indiana Central Railway Company; Thomas L. Jewett was then president of the said Steubenville & Indiana Railroad Company; J. Edgar Thompson was the president of both the said Pennsylvania Railroad Company and the Pan Handle Railroad Company, and J. P. Alexander was then president of the St. Louis, Vandalia & Terre Haute Railroad Company, the complainant herein; that during the year 1867, at the special instance and request of the several presidents last named, negotiations were opened with this affiant, president of the Terre Haute & Indianapolis Railroad Company, for the purpose of establishing a through line between the said city of New York and the city of St. Louis, Missouri, and these negotiations finally resulted in an agreement substantially as follows, to wit: The said Terre Haute & Indianapolis Railroad Company, defendant herein, was at its own expense to extend its line of railroad
36 from the city of Terre Haute, Indiana, to the line dividing the States of Indiana and Illinois, and it, together with the Columbus, Chicago & Indiana Central Railroad Company, the Steubenville & Indiana Railroad Company, and the Pan Handle Railroad Company, were to furnish the means and to complete and equip, under the charter of the said St. Louis, Vandalia & Terre Haute Railroad Company, a line of railroad from East St. Louis aforesaid across the State of Illinois to a junction of the proposed extension of the Terre Haute & Indianapolis Railroad Company at the line dividing the States of Indiana and Illinois, and as an express condition and part of this agreement it was required by the parties thereto other than the Terre Haute & Indianapolis Railroad Company that the last-named company should, upon the completion of the said St. Louis, Vandalia & Terre Haute railroad, take charge of and operate the same upon the terms as they appear in the contract of February 10th, 1868, set out in pages 12, 13, & 14 of the printed bill of complaint herein.

That for the purpose of carrying out the agreement aforesaid three separate instruments were duly executed, one of which was the contract set out in the bill of complaint as aforesaid and called therein a "pretended lease;" another was a contract executed by the said Pennsylvania Railroad Company, the Steubenville & Indiana Railroad Company, the Pan Handle Railroad Company, the Columbus, Chicago & Indiana Central Railway Company, and the Terre Haute & Indianapolis Railroad Company specifying the proportions in which the money to be used in the construction of the St. Louis, Vandalia &
37 Terre Haute railroad should be furnished by the several parties thereto other than the Pennsylvania Railroad Company, respectively, and requiring that the said several companies other

than the said Pennsylvania Railroad Company should subscribe and pay for (which they afterwards did) the second-mortgage bonds of the complainant company at par, to wit:

This defendant, two hundred thousand dollars ($200,000); the Columbus, Chicago & Indiana Central Railway Company, three hundred thousand dollars ($300,000); the Steubenville & Indiana Railroad Company, two hundred and fifty thousand — ($250,000), and the Pan Handle Railroad Company two hundred and fifty thousand dollars ($250,000), the said bonds to be without endorsement and to be convertible into stock within ten years from their date, and that said companies should jointly endorse and guarantee the payment of principal and interest of the first and second mortgage bonds to be issued by the said St. Louis, Vandalia & Terre Haute Railroad Company to the amount of ($3,500,000) three million five hundred thousand dollars—that is to say, one million nine hundred thousand dollars ($1,900,000) of first-mortgage bonds and one million six hundred thousand dollars ($1,600,000) of second-mortgage bonds, the said Pennsylvania Railroad Company by the terms of said contract binding itself to guarantee that the obligations assumed in the contract by the said Steubenville & Indiana Railroad Company and the Pan Handle Railroad Company should be faithfully carried out and performed at all times during the continuance of this agreement by them and their successors
38 under this contract, and further agreeing that, on failure of said companies to meet said obligation, it would perform the same on demand; and this said contract further provided that the said Terre Haute & Indianapolis Railroad Company should extend its railroad to the line between the States of Indiana & Illinois, as aforesaid, and there form a junction with the eastern terminus of the said St. Louis, Vandalia & Terre Haute railroad, and that after all net earnings of the said St. Louis, Vandalia & Terre Haute Railroad Company and the profits under the contract aforesaid of February 10, 1868, applied to the payment of interest on mortgages, sinking funds, and other purposes, as provided in said contract, the parties to this contract should be responsible to the company or companies operating the said road or their respective shares of deficiencies, should any exist, at any time to meet the interest and all obligations assumed under said contract of February 10th, 1868, including what might be needed for putting said road in order and for the running expenses thereof and maintaining the same, together with the construction of all necessary switches, depots, sidings, equipments, and other facilities required to properly operate said road after delivery by the contractors, and also for the endorsement of said bonds—that is to say, the Columbus, Chicago and Indiana Central Railway Company should be responsible for three-tenths of the whole amount of said deficiency, and the Steubenville & Indiana Railroad Company should be responsible for two and one-half tenths of said deficiency, and the Pan Handle Railroad Company should be responsible for two and one-half tenths of said deficiency, and the Terre Haute & Indianapolis Railroad
39 Company should be responsible for two-tenths of said deficiency, to be paid on the demand of the company or com-

panies that might operate the road under the lease from the said St. Louis, Vandalia & Terre Haute Railroad Company, and if any surplus or profit should be made by the company operating the road, as aforesaid, each of the parties to this contract should be entitled to a proportion of such profits, which proportion should be determined upon the basis of the liability which each party to the contract assumed and agreed to pay.

And this agreement further provides for the running trains, both passenger and freight, over the lines of the respective companies parties thereto without break of connection and as one road, and also prescribed the manner in which freight and passenger rates should be divided between the parties thereto, and stipulated that said parties should generally conduct the through business over the said lines in such form as would best tend to promote the joint and several interests of each of the parties thereto, adopting from time to time such rates, rules, and regulations as would accomplish that end.

The third and last of said contracts was executed under date of February 10th, 1868, by the said Thomas L. Jewett, B. E. Smith, George B. Roberts, and this affiant, as parties of the first part, and the said St. Louis, Vandalia & Terre Haute Railroad Company, as party of the second part, and provided that the said parties of the first part should furnish all the additional material needed to complete the unfinished portion and to construct, equip, and complete the whole of said St. Louis, Vandalia & Terre Haute railroad, under the charters and laws relating thereto, in accordance with the specifications set forth in said contract, and in consideration thereof the party of the second part was to pay the parties of the first part the sum of one million nine hundred thousand dollars ($1,900,000) of the first-mortgage bonds, two million six hundred thousand dollars ($2,600,000) of the second-mortgage bonds, and two million dollars ($2,000,000) of the capital stock of the said St. Louis, Vandalia & Terre Haute Railroad Company: Provided, however, That so many of first-mortgage bonds as might have been issued, not exceeding, however, the sum of three hundred and sixty thousand dollars ($360,000), should be considered as a payment on account of above-mentioned one million nine hundred thousand dollars. The equipment to be furnished by the terms of this contract was to consist of twenty locomotives, twenty first-class passenger cars, five second-class passenger cars, six baggage cars, three hundred freight cars, and thirty gravel or roadway cars. Copies of the two said contracts last above mentioned are attached hereto and made a part of this affidavit and marked Exhibits "A and B," respectively. That contract, set out as aforesaid in complainant's "bill of complaint" and referred thereto as a "pretended lease," and the two contracts last above mentioned contain substantially the terms and conditions agreed upon between all the parties concerned for the construction of the said St. Louis, Vandalia & Terre Haute Railroad Company and the establishment of a through line between the city of New York and the city of St. Louis as aforesaid, and all of said terms and conditions were established and agreed

upon as part and parcel of one transaction before any of said contracts were executed by the parties thereto respectively.

41 That, pursuant to the several contracts aforesaid, the said Terre Haute & Indianapolis Railroad Company constructed an extension of its railroad from Terre Haute to the line dividing the States of Indiana and Illinois at a cost, to wit, of almost five hundred thousand dollars ($500,000), and the St. Louis, Vandalia & Terre Haute railroad was also constructed and completed to a junction of the Terre Haute & Indianapolis railroad aforesaid pursuant to and in accordance with the terms of the third contract hereinbefore referred to, and the several parties to the second contract hereinbefore referred to furnished the money to pay for construction and equipments of said St. Louis, Vandalia & Terre Haute railroad in accordance with the terms and conditions in said second contract set forth.

That about the first day of July, 1870, pursuant to the stipulations and agreements in the three said contracts contained, the said St. Louis, Vandalia & Terre Haute railroad, with its equipments, was duly turned over to the said Terre Haute & Indianapolis Railroad Company, the defendant herein, to be operated in accordance with the operating contract set forth as aforesaid in complainant's bill of complaint herein.

And the said second contract referred to, executed under date of February 10, 1868, by the said five railroad companies hereinbefore named, and since the said first day of July, 1870, and up to the present time, the said Terre Haute & Indianapolis Railroad Company, defendant herein, has continuously operated the said St. Louis, Vandalia & Terre Haute railroad under said contract, and in connection with its own line and those lines of the several com-

42 panies east of Indianapolis, hereinbefore referred to, in accordance with the terms of said two contracts last above named, and the said Terre Haute & Indianapolis Railroad Company has paid all the taxes chargeable by law and assessments against the property of the St. Louis, Vandalia & Terre Haute Railroad Company of every kind and description during the entire period from the date of said operating contracts, otherwise called by complainant pretended lease, out of the thirty per cent., which by the terms of the contract was payable to the St. Louis, Vandalia & Terre Haute Railroad Company, and during the whole of said period since the making of said contract the same has been otherwise in all respects performed without any complaint made on behalf of the complainant company or any of its stockholders, except as herein otherwise stated; that since the making of said several contracts, as hereinbefore stated, as affiant is informed and believes, the said Pan Handle railroad and the said Steubenville & Indiana Railroad Company have been consolidated under the name and style of the Pittsburgh, Cincinnati & St. Louis Railroad Company, and the Columbus, Chicago & Indiana Central Railway Company since said date leased its line of railroad to the Pittsburgh, Cincinnati & St. Louis Railroad Company, the last-named company, as affiant is informed and believes, making an assignment to itself of all the in-

terest of the said Columbus, Chicago & Indiana Central Railway Company which it held in the said St. Louis, Vandalia & Terre Haute railroad by reason of the several contracts hereinbefore referred to, and specifically agreeing to carry out and perform the obligations assumed by the said Columbus, Chicago & Indiana Central Railway Company in the said contract.

43 That after the making of the lease and the assignment of the interest of the Columbus, Chicago & Indiana Central Railway Company as aforesaid proceedings to foreclose certain mortgages upon the property of the said Columbus, Chicago & Indiana Central Railroad Company were instituted, which resulted in the sale of said property and a reorganization of said company under the name and style of the Chicago, St. Louis & Pittsburgh Railroad Company.

That George B. Roberts, the same person already referred to herein, is now, and for some time past has been, the president of the said Pennsylvania Railroad Company and of the said Pittsburgh, Cincinnati & St. Louis Railroad Company and of the said Chicago, St. Louis & Pittsburgh Railroad Company, and for some years was also president of the St. Louis, Vandalia & Terre Haute Railroad Company, the complainant herein.

That Thomas D. Messler is now, and for some years last past has been, the president of the said St. Louis, Vandalia & Terre Haute Railroad Company, and also third vice-president and comptroller of the said Pittsburgh, Cincinnati & St. Louis Railroad Company and Chicago, St. Louis & Pittsburgh Railroad Company.

That J. N. McCullough for more than eight years last past has been and is now first vice-president of said Pittsburgh, Cincinnati & St. Louis Railroad company and since its organization has been and is now first vice-president of said Chicago, St. Louis & Pittsburgh Railroad Company, and William Thaw during the same periods last aforesaid has been and is now second vice-president of the two companies last aforesaid, respectively, and J. T. Brooks,

44 solicitor for complainants herein, is now, and for some time past has been, the general counsel of the said two last-named companies.

That during the first five years the said St. Louis, Vandalia & Terre Haute Railroad Company was operated by the defendant herein as aforesaid, by reason of the comparatively incomplete condition in which it was turned over by the contractors and in order to adapt it to the business passing over it as part of a through line between the city of New York and the city of St. Louis and for the better and more economical operation of it, it was deemed necessary by all parties in interest to improve and add to it in the way of filling up trestles, cutting down grades, replacing pile bridges with bridges resting upon permanent masonry or with stone culverts, erecting depots and freight-houses, constructing side tracks, acquiring additional and expensive terminal facilities, and increasing the equipment, both as to locomotives and freight cars.

That, in order to raise money to pay for the improvements, betterments, and additions hereinbefore referred to, the board of directors of

the said St. Louis, Vandalia & Terre Haute Railroad Company, in January, 1871, created an issue of income bonds bearing interest, payable annually or when earned, at seven per cent. per annum, to the amount of one million dollars ($1,000,000), and negotiated the same, and this action was by the stockholders of said St. Louis, Vandalia & Terre Haute Railroad Company approved at their regular annual meeting, 1872; that the proceeds of said income bonds were expended in making the betterments, additions, and improvements upon the said St. Louis, Vandalia & Terre Haute rail-
45 road hereinbefore indicated and in liquidating a floating debt against the said last-named company which had then accrued.

That the earnings of said St. Louis, Vandalia & Terre Haute Railroad Company for the year ending October 31st, 1873, were insufficient to pay the interest on income bonds, this deficiency amounting, October 31st, 1872, to $32,475 for the year ending that date, and for the year ending October 31st, 1873, said deficiency amounted to $57,431.23.

That in addition to the deficiencies, as above stated, the said St. Louis, Vandalia & Terre Haute Railroad Company, on the 31st day of October, 1873, owed a net floating debt, after deducting all assets available for the payment thereof, in the sum of $436,462.10; and of the gross amount of this floating debt there was due to the defendant herein at the last-named date, for construction and equipment expenditures advanced by it, the sum of $319,867.36, and this amount, during the year ending October 31st, 1874, was increased to $343,005.77, and on said 31st day of October, 1874, there was only due from said defendant to the complainant herein, on account of earnings under the contract of February 10th, 1868, set out in complainant's "bill of complaint" as aforesaid, the sum of $86,248.36.

That at the regular annual meeting of the stockholders of the said St. Louis, Vandalia & Terre Haute Railroad Company, held at Greenville, Illinois, on the 13th day of January, 1874, the following preambles and resolutions were by said stockholders adopted:

"Whereas the board of directors of the St. Louis, Vandalia & Terre Haute Railroad Company has laid before the stockholders
46 of said company a resolution adopted by them, wherein they say that, in view of the necessities of the company and the present condition of its indebtedness, it is their opinion that preferred stock to the amount of two millions of dollars shall be issued, to be exchanged for the outstanding income bonds, the payment of the floating debt, the amount due for construction, and to provide for the necessities of the road, the said stock bearing interest at the rate of seven per cent. — annum: Therefore—

Resolved, That the consent of the stockholders be, and the same is hereby, given thereto.

Resolved, That the secretary of this meeting lay a copy of this preamble and resolution before the board of directors."

"Whereas the board of directors of the St. Louis, Vandalia & Terre Haute Railroad Company, having first obtained the consent of the stockholders therefor, did at their meeting, held at Greenville,

in the county of Bond and State of Illinois, on Tuesday, the 13th day of January, 1874, adopt a preamble and resolution in the words and figures following, to wit:

"Whereas this company did, on the 1st day of January, 1871, issue one thousand income bonds of that date, numbered from one to one thousand, inclusive, payable to George B. Roberts or bearer, and each for the sum of one thousand dollars, payable thirty years after date, with interest at the rate of seven per cent. per annum, with interest coupons attached, making in the aggregate of said bonds the sum of one million dollars, all of which bonds are now outstanding and, together with the interest and accumulated interest thereon, are unpaid; and whereas this has a floating debt incurred in the
47 construction account and otherwise necessary to the operation of the road in the hands of any of —and by the lessee thereof, amounting to the sum of four hundred and thirty-six thousand four hundred and sixty-two dollars and ten cents.

"And whereas the expenditures for construction must be necessarily increased in the future in order to secure the successful operation and use of said road under the lease thereof; and whereas it is desirable that the said accrued indebtedness and the sum necessary for the said future expenditure should be provided for by the surrender and cancellation of said income bonds and by the issuance of preferred stock of said company to that amount sufficient therefor: Therefore—

"Resolved, That the president of this company be, and he is hereby, authorized to cause to be issued certificates of preferred stock of this company to the amount of two million dollars, bearing interest at the rate of seven per centum per annum, which stock shall be conditioned that the interest and the accumulated interest thereon shall be paid out of the excess of income of each year over and above the amount payable to the lessee for operating the road, and the interest upon the first and second mortgage bonds of the company now outstanding, together with the payment of taxes and the proper cost of maintaining organization and in preference to any dividend which might or could be made upon common stock of said company and before the payment of any such last-named dividend: Provided, That when there was no excess of income for the year next preceding the time when the interest upon the said preferred stock is due, or for any year, then the interest upon said preferred stock shall
48 not be payable for that year, but shall accumulate, and the accumulated amount thereof shall be paid whenever the excess of income over and above the aforesaid necessary payments and expenditures shall be sufficient therefor, and a dividend for that purpose shall be made by the board of directors.

Resolved, That the president be, and he is hereby, authorized to exchange such an amount of said certificates of preferred stock as may be necessary therefor for the said one million of dollars of said income bonds and the accumulated interest thereon up to the date of said surrender, and thereupon *up to the date of said surrender and thereupon* he shall cause all the said income bonds so surrendered to be destroyed or cancelled, and is also authorized to use in like man-

ner a sufficient amount of said certificates of preferred stock — shall be from time to time disposed of by the board of directors in such manner as they shall deem best to promote the interest of said road: Now, therefore—

Resolved by the board of said St. Louis, Vandalia & Terre Haute Railroad Company in annual meeting assembled, That the act of said board of directors in the adoption of said preamble and resolution be, and the same is hereby, ratified and approved, and that said board of directors be, and they are hereby, fully empowered and authorized to carry the same into effect.

Resolved, That the secretary of this meeting furnish a copy of these proceedings to the secretary of said company, to be by him laid before the said board of directors.

That the income bonds hereinbefore referred to were duly exchanged for the preferred stock authorized by and issued under the foregoing resolution, and the said debt due the said Terre
49 Haute & Indianapolis Railroad Company, defendant herein, under date of October 31st, 1874, was also settled by the issue of a portion of the preferred stock authorized as aforesaid, and from time to time thereafter a portion of said preferred stock was also issued to the defendant herein in payment for additional betterments in the way of constructions and equipments made by it upon the said St. Louis, Vandalia & Terre Haute railroad.

That the said defendant received and paid for its due proportion of the stock and bonds—that is to say, two-tenths of said stock and bonds, which were received by the contractors, McKeen, Smith, Roberts, & Jewett, as payment for the completion and equipment of said St. Louis, Vandalia & Terre Haute railroad, pursuant to the plans of the construction contract hereinbefore referred to; and affiant is informed and believes that the remainder of said stock and bonds were allotted to the Columbus, Chicago & Indiana Central Railway Company, the Steubenville & Indiana Railroad Company, and the Pan Handle Railroad Company, in the following proportions, to wit: To the first-named company, three-tenths; to the second and third, two and one-half-tenths each; that the defendant herein has disposed of a portion of the bonds received by it as aforesaid, but it is now the owner of two of said first-mortgage bonds and one hundred and one of said second-mortgage bonds and four thousand five hundred shares of common stock and three thousand two hundred and sixty shares of preferred stock of said St. Louis, Vandalia & Terre Haute Railroad Company; that since October 1st, 1874, and up to October 31st, 1886, *and* the said Terre Haute & In-
50 dianapolis Railroad Company, defendant herein, has expended in betterments to said St. Louis, Vandalia & Terre Haute railroad and in the purchase of additional equipment for the use of said railroad large sums, amounting in the aggregate to 790,816.61, and no part of this amount has been paid by nor is it charged to said St. Louis, Vandalia & Terre Haute Railroad Company.

That adding to above-named amount the actual cost of operating the said St. Louis, Vandalia & Terre Haute railroad, including rental and the seventy per cent. of gross earnings allowed under the

contract for such operation, has failed to meet the sum total of the cost of said betterments and the cost of operating as aforesaid, and thereby a deficiency has been created, which was advanced from time to time by the said Terre Haute & Indianapolis Railroad Company, and which amounted, on the said 31st day of October, 1886, as affiant is informed and believes, to about the sum of $1,661,640.00; that this amount has been reduced in part by profits arising from the operation of said St. Louis, Vandalia & Terre Haute railroad for less than seventy per cent. of gross earnings and by the refunding to the said Terre Haute & Indianapolis Railroad Company *are* five-tenths of the total amount of said deficiency by the said Pittsburgh, Cincinnati & St. Louis Railroad Company, but there now remain due and unpaid to the said Terre Haute & Indianapolis Railroad Company about the sum of $271,000, being the balance due to it under the contract, which is attached to this affidavit and marked Exhibit A, as the proportion of loss originally chargeable to the Columbus, Chicago & Indiana Central Railway Company, and this last-named sum the said Pittsburgh, Cincinnati & St.
51 Louis Railroad Company has continuously failed and refused to pay, although having been requested so to do by the said Terre Haute & Indianapolis Railroad Company.

That prior to January 1st, 1875, the said Pittsburgh, Cincinnati & St. Louis Railroad Company discharged all the obligations assumed by the Columbus, Chicago & Indiana Central Railway Company in the contract hereinbefore referred to; that at an early period the operation of the said St. Louis, Vandalia & Terre Haute Railroad Company aforesaid by the Terre Haute & Indianapolis Railroad Company under the contracts hereinbefore referred to, the question of creating a sinking fund under the first mortgage of said St. Louis, Vandalia and Terre Haute Company, referred to in the complaint herein, was discussed between this affiant, as president of the said Terre Haute & Indianapolis Railroad Company, and some of the executive officers of the several railroad companies parties to the contract hereinbefore referred to as Exhibit A, this affiant and some of said officers being at the time directors of said St. Louis, Vandalia & Terre Haute Railroad Company, and as a result of such discussion it was agreed that, in view of the betterments already put upon the St. Louis, Vandalia & Terre Haute Railroad Company and those contemplated, and the additions made and to be made to its equipment, it would not be necessary to create such sinking fund unless the trustee of said mortgage required it; that no demand has ever been made upon the said Terre Haute & Indianapolis railroad by either said trustee or by St. Louis, Vandalia & Terre Haute Rail-
road Company or by any person or corporation; that the
52 sinking fund referred to in the said first mortgage should be operated.

That ever since the said Terre Haute Railroad Company commenced to operate the said St. Louis, Vandalia & Terre Haute Railroad Company as aforesaid it has rendered to the said St. Louis, Vandalia & Terre Haute railroad a statement of all the receipts from such operation, and also a statement of all the disbursements made

on account thereof under the operating contract heretofore referred to for each and every month during the period aforesaid, and has also made a similar statement at the end of each and every year since it commenced to operate said road under said contract, and all accounts connected with the operation of said road under said contract have been annually stated and agreed upon between the said St. Louis, Vandalia & Terre Haute Railroad Company and said Terre Haute & Indianapolis Railroad Company, the last of said annual statements being under date of October 31st, 1886, the end of the fiscal year adopted by said two companies; that all and each of said annual statements have been incorporated in the annual report made by the president and board of directors of said St. Louis, Vandalia & Terre Haute Railroad Company to the stockholders thereof at their annual meetings, respectively, and in their report for the year ending October 31st, 1886, by such stockholders the condition of the accounts between two said companies is stated by the president and directors of said St. Louis, Vandalia and Terre Haute Railroad Company; that for the years hereinafter stated the thirty per cent. of the gross earnings payable to the said St. Louis,

53 Vandalia & Terre Haute Railroad Company under the said operating contract were insufficient to pay the interest of all its bonds, taxes, general expenses, and other indebtedness of said St. Louis, Vandalia & Terre Haute Railroad Company, and the Terre Haute and Indianapolis Railroad Company advanced what was necessary to make up the deficiency, which advances amounted, in the following-named years, to the following-named amounts, to wit:

For the year ending October 31st, 1876, $29,069.47.
For the year ending October 31st, 1877, $66,637.69.
For the year ending October 31st, 1878, $127,096.38.
For the year ending October 31st, 1879, $118,326.16.

That on October 31st, 1880, the total amount due the St. Louis, Vandalia & Terre Haute Railroad Company on account of said thirty per cent. was nine hundred and forty-two dollars and ninety-three cents, and that on that date the said St. Louis, Vandalia & Terre Haute Railroad Company, on account of construction and equipment, owed to the Terre Haute & Indianapolis Railroad Company $20,940.73; that since October 31st, 1880, by reason of the increased gross earnings of said St. Louis, Vandalia & Terre Haute Railroad Company the thirty per cent. of said gross earnings payable under said operating contract as aforesaid was more than sufficient each and every year to pay the charges arising against it, and at the last settlement of accounts between the said Terre Haute & Indianapolis Railway Company and said St. Louis, Vandalia & Terre Haute Railroad Company there was due from the former to the latter on account of said thirty per cent. a balance of about $500,000; that payment of this amount or settlement thereof has

54 not been requested by the said St. Louis, Vandalia & Terre Haute railroad. The question of its payment has, however, been at different times discussed by this affiant and some of the officers of said St. Louis, Vandalia & Terre Haute Railroad

Company, and it has been urged in behalf of said Terre Haute & Indianapolis Railroad Company that the balance due it on account of advances made by it to pay the three-tenths of loss in operating the said St. Louis, Vandalia & Terre Haute railroad since 1875, hereinbefore referred to, should be paid by the said Pittsburgh, Cincinnati & St. Louis Railway Company at the same time a settlement was made of the balance due on account of the thirty per cent. of the gross earnings aforesaid, but said Pittsburgh, Cincinnati — Railway Company has uniformly refused to pay such balance, and the same remains wholly unpaid.

That no demand for the cancellation of said operating contract or for a surrender of said St. Louis, Vandalia & Terre Haute railroad has ever been made upon the said Terre Haute & Indianapolis Railroad Company, except that in 1879 Thomas D. Messler, J. N. McCullough, and William Thaw hereinbefore named, signing themselves the executive officers' committee of the Pittsburgh, Cincinnati & St. Louis Railway Company, demanded such cancellation and surrender, and the said Terre Haute & Indianapolis Railroad Company refused to comply with such demand.

That the said Terre Haute & Indianapolis Railroad Company has 80 miles of a first-class road in the State of Indiana fully equipped with locomotives and cars; that it has also nearly 40 miles of branches in the coal regions of Clay county, Indiana, together with more than 30 miles of side track between the city of Indianapolis and the Indiana State line.

That it was open for business between Indianapolis and the
55 city of Terre Haute in 1852, and has been continuously since that time operated with profit to its stockholders, and on the 31st day of October, 1886, its annual statement showed a balance, being a surplus of assets, $1,456,372.06.

That the bonds of said St. Louis, Vandalia & Terre Haute Railroad Company, guaranteed as hereinbefore stated by said Terre Haute & Indianapolis Railroad Company, were negotiated upon the faith of said guaranty, and a majority of the capital stock of said Terre Haute & Indianapolis Railroad Company has within the last sixty days been sold, and the purchasers thereof bought the same, as affiant is informed and believes, relying on the validity of the operating contract hereinbefore referred to.

That affiant is unable to state who the present stockholders of the St. Louis, Vandalia & Terre Haute Railroad Company are, other than the Terre Haute & Indianapolis Railroad Company, because of the fact that the stock books of said company within the last few months have been taken from the office of the secretary of said St. Louis, Vandalia & Terre Haute Railroad Company, in Greenville, Illinois, to the city of Pittsburgh, Pennsylvania.

WILLIAM R. McKEEN.

STATE OF ILLINOIS, } ss:
County of Sangamon, }

William R. McKeen, being duly sworn, upon his oath deposes and says that the statements made in the foregoing affidavit upon his

own knowledge are true, and those stated upon information and belief he believes to be true and in fact.

WILLIAM R. McKEEN.

Subscribed and sworn to before me this 14th day of July, 1887.
JAMES T. JONES, *Clerk.*

(Indorsed:) Filed July 14, 1887. James T. Jones, clerk.

56 EXHIBIT "A."

Articles of agreement entered into this 11th day of March, A. D. 1868, between the Terre Haute & Indianapolis Railroad Company, the Columbus, Chicago & Indiana Central Railway Company, the Steubenville & Indiana Railway Company, and the Pennsylvania Railway Company, witnesseth:

Whereas it is a matter of great public interest and absolute value to the railroad companies, parties to this agreement, owning or controlling railroads between New York, Philadelphia, and Baltimore via Pittsburgh to Terre Haute Indiana, that a first-class railroad should be provided between Terre Haute and St. Louis for the transportation of persons and property;

And whereas it is desirable that said railroad, across the State of Illinois, shall be completed under the charter of St. Louis, Vandalia & Terre Haute Railroad Company, and a certain contract having been entered into on the 10th day of February, A. D. 1868, for the completion of said road across the State of Illinois; therefore, in order to provide for the effective working of said road and also to provide a satisfactory financial basis to complete it, *therefore* it is agreed by and between the parties thereto that the Terre Haute & Indianapolis Railroad Company shall take $200,000, and the said Columbus & Indiana Railway Company shall take $300,000, and the said Steubenville & Indiana Railroad Company shall take $250,000, and the said Pan Handle Railway Company shall take $250,000 of the second-mortgage seven per cent. bonds from the contractors for building said St. Louis, Vandalia & Terre Haute railroad at par, and said bonds to be without endorsement
57 and convertible into stock, at the pleasure of the holder, within ten years from their date; and the said Terre Haute & Indianapolis Railroad Company, and the said Columbus, Chicago & Indiana Central Railway Company, and the said Steubenville & Indiana Railroad Company, and the said Pan Handle Railway Company shall jointly indorse and guarantee the payment of the principal and interest of the residue of the first and second mortgage bonds to be issued by the said St. Louis, Vandalia & Terre Haute Railroad Company, amounting to $3,500,000—that is to say, $1,900,000 of first-mortgage bonds and $1,600,000 of the second-mortgage bonds.

It is further agreed, that when this contract is executed by the parties hereto they shall proceed, without delay, to avail themselves of the organization now existing under the charter of the said St.

Louis, Vandalia & Terre Haute Railroad Company, so as to provide for the completion of said road, across the State of Illinois, as soon as practicable, and when said road is completed from St. Louis to the line between the States of Illinois and Indiana, the same shall be subject to the lease executed heretofore by the said St. Louis, Vandalia & Terre Haute Railroad Company.

It is further agreed by and on the part of the Terre Haute & Indianapolis Railroad Company that the said last-named company will, at their own cost and expense, extend their line of railroad from Terre Haute across the Wabash river to such point on the line between the States of Indiana and Illinois as may be necessary to form a junction with the eastern terminus of the said St. Louis, Vandalia & Terre Haute railroad, and that the same shall be put in good running order by the time the said last-named road
58 is ready for the cars to pass over it.

It is further agreed that the said road shall be leased to the said companies for the mutual benefit of all of said companies upon the terms and conditions of the lease already made with the St. Louis, Vandalia & Terre Haute Railroad Company to the Terre Haute & Indianapolis Railroad Company, provided the said Terre Haute & Indianapolis Railroad Company shall decide to do so, but in any event the said road is to be operated under said lease for the mutual and common benefit of the said Terre Haute & Indianapolis Railroad Company, the said Columbus, Chicago & Indiana Central Railway Company, the Steubenville & Indiana Railroad Company, and the said Pan Handle Railway Company and their successors respectively.

It is further agreed, and this contract is made upon the express condition, that after all the net earnings of the St. Louis, Vandalia & Terre Haute Railroad Company and profits under the lease are applied to the payment of interest on mortgages, sinking fund, and other purposes, as provided in the conditions of said lease, a copy of which is hereto attached, that the parties, respectively, shall be responsible to the company or companies that may operate the road for their respective shares of deficiencies, should any exist at any time, to meet the interest and all obligations assumed under said lease, including what may be needed for putting said road in running order and for the running expenses thereof and maintaining the same, together with the construction of all necessary switches, depots, sidings, equipment, and other facilities required by the contractors, and also for the indorsement of said bonds—that is
59 to say, the Columbus, Chicago and Indiana Central Railway Company shall be responsible for three-tenths of the whole amount of such deficiency, and the Steubenville & Indiana Railway Company shall be responsible for two and one-half tenths of such deficiency, and the Pan Handle Railway Company shall be responsible for two and one-half tenths of such deficiency, and the Terre Haute & Indianapolis Railroad Company shall be responsible for two-tenths of such deficiency, to be paid upon the demand of the company or companies that may operate the road under the lease from the St. Louis, Vandalia & Terre Haute Railroad Company, and

if any surplus of profit is made by such lessee or company operating the road as aforesaid each of the parties hereto shall be entitled to their respective proportions of profit or surplus thus realized according to their respective liability for the indorsements hereinbefore referred to.

It is further agreed that the Pennsylvania Railroad Company shall and does hereby guarantee that the obligations assumed in this contract by the Steubenville & Indiana Railroad Company and the Pan Handle Railway Company for themselves and their successors under this contract shall be faithfully carried out and performed at all times during the continuance of this agreement, and on failure of the said companies to meet said obligations the said Pennsylvania Railroad Company hereby binds itself to perform the same on demand.

It is further agreed by and between the parties hereto that all the stipulations set forth in this contract shall be faithfully performed by the parties respectively, and it is also agreed that
60 all needful trains for the transportation of passengers and freight between the eastern and western cities and intermediate points upon either of their respective lines shall be run without break of connection and as one road; and the proportion of receipts for all through or joint business done by said route and lines and all proper expenses for procuring said route and lines and all proper expenses for procuring said business shall be prorated as to distance moved on each of said lines.

The appropriate officers of the companies hereto shall monthly adjust and divide said receipts and expenses, the statements to be made monthly; the times, speed, and manner of running said trains shall be such as will give the said route the full advantage of its short length between the east and west, and properly perform the mail service required of it under existing contracts or contracts that may hereafter be made with the Post Office Department.

The speed for all through trains shall be prorated as to the distance moved on each line.

Each of said companies hereto shall manage its own road and affairs and keep its tracks and rolling stock in first-class condition, but they shall carry out in all respects the orders and arrangements of the superintendents and other proper officers of the companies parties hereto as to said through lines and business, and to generally conduct the business in such form as will best tend to promote the joint and several interests of each of the parties hereto, adopting from time to time such rates, rules, and regulations as will accomplish that end.

It being further expressly understood and agreed that the
61 through rates agreed upon from time to time between the east and the west by the parties hereto in connection with the Pennsylvania Railroad Company and its connections shall be the minimum rate for traffic carried to and from the east and west, and in no event shall the rates given or allowed to any other line or route by any party hereto be less than is given or established by this joint route between the east and west via Pittsburgh.

In witness whereof the parties hereto have interchangeably affixed their official signatures this 11th day of March, A. D. 1868, subject to the approval of the board of directors of their respective companies.

J. EDGAR THOMSON,
President P. R. R. Company.
THOS. L. JEWETT,
President S. & I. R. W. Co.
J. EDGAR THOMSON,
Pres't Pan Handle R. R. Co.
B. E. SMITH,
Pres. C., C. & Ind. Central Railway Company.
[SEAL.] W. R. McKEEN,
President Terre Haute & Indianapolis R. R. Co.

Witnesses at signing:
G. B. ROBERTS.
ALBERT HEWSON.

Witness as to B. E. Smith, pres't.
G. MOODIE.

Witness as to Wm. R. McKeen, president:
R. W. THOMPSON.

(Indorsed:) Filed July 14, 1887. James T. Jones, clerk.

62 EXHIBIT B.

Memoranda of agreement made and concluded this the tenth day of February, A. D. 1868, by and between Thomas L. Jewett, of Ohio; B. E. Smith, of Ohio; George B. Roberts, of Philadelphia, and William R. McKeen, of Indiana, of the first part, and the St. Louis, Vandalia and Terre Haute Railroad Company, of the second part, witnesseth:

(Stamp. J. F. A. Feb. 10th, 1868.) That, for and in consideration of the payments and covenants hereinafter mentioned to be made and performed by the party of the second part, the party of the first part doth hereby covenant and agree to furnish all the additional material needed to complete the unfinished portion and to construct, complete, and equip the whole of the said St. Louis, Vandalia and Terre Haute railroad under the charter and laws relating thereto.

Specifications.

The road shall extend from east side of the Mississippi river, opposite St. Louis, to the eastern boundary of the State of Illinois, by such route, via Highland, Greenville, and Vandalia, as may be suggested by the chief engineer of the company, approved by the contractors, and hereafter be approved by the board of directors, and shall connect with the extension of the Terre Haute & Indianapolis

railroad to be made to the said State line of western side of the Wabash river. The road shall be graded and constructed in every way as a first-class Western railroad, the grades not to exceed one foot in a hundred, with such wood, water, passenger, and freight stations, buildings, fixtures, and sidings as may be necessary for the accommodation of the traffic or business when the road is opened and
63 ready for use. The rail shall not be less than fifty-six pounds to the yard. Suitable engine-houses and shops to meet the requirements of the operating of the railroad shall be constructed at East St. Louis and Greenville.

In order to effect a more speedy opening of the line the chief engineer of the company shall be authorized to substitute trestle-work in place of embankment and masonry at such points as he may designate, and the difference between the cost of the work so constructed and the cost of embankment and masonry shall be adjusted on an equitable basis between the parties to this agreement.

(Stamp. J. F. A. Feb'y 10, 1868.) The equipment shall consist of twenty locomotives, twenty first-class passenger cars, five second-class passenger cars, six baggage cars, three hundred freight cars, thirty gravel or roadway cars.

In consideration whereof the party of the second part shall pay to the party of the first part as follows: The sum of one million nine hundred thousand dollars of their first-mortgage bonds, two million six hundred thousand dollars of their second-mortgage seven per cent. bonds, and two million dollars of the capital stock of the said company, all at their par value: Provided, however, That so many of the said first-mortgage bonds as may have been issued, not exceeding, however, the sum of three hundred and sixty thousand dollars, shall be considered as a payment on account of the above-mentioned one million nine hundred thousand dollars of first-mortgage bonds. The said securities shall be paid to the parties
64 of the first part as follows—that is to say, monthly as the work progresses, *pro rata* with the proportion of the work done and materials purchased to the entire work to be done and materials to purchase, such *pro rata* or monthly proportion to be estimated by the chief engineer of the company; and when the road and its equipment is duly constructed and furnished in accordance with the contract, then the full balance of the above securities not issued or paid to the parties of the first part shall be forthwith issued and paid to them or their legal representatives.

It is farther agreed and understood that the party of the second part shall furnish and pay for all right of way and real estate that may be required to construct the said road and furnish the necessary grounds for the proper requirements of the company at the proper points along the line of said road and termini thereof.

(Stamp. J. F. A. Feb'y 10, 1868.) The construction of the road shall be commenced not later than the first day of March, A. D. 1868, and that portion of the road between Vandalia and East St. Louis shall be prepared for the movement of trains during the year last mentioned, and between East St. Louis and Highland by the first day of July next,

and the balance of the road completed within three years from the first day of March, A. D. 1868.

During the progress of the construction of the said railroad all the earnings derived from transportation over the operating expenses properly chargeable thereto shall be paid over by the contractors to the St. Louis, Vandalia & Terre Haute Railroad
65 Company to meet the interest on the first and second mortgage bonds, and if the amount so paid should not be sufficient to fully pay said interest the said contractor shall advance for the company whatever funds may be needed from time to time to meet at maturity the interest on all bonds that may be issued, and they shall be indemnified by the said company therefor.

And it is further agreed and understood that none of the provisions of this contract shall be altered or amended without the consent of all the members of the board of directors of the St. Louis, Vandalia & Terre Haute Railroad Company.

In witness whereof the respective parties hereto have interchangeably set their hands and seals the day and year first above written.

(Stamp. J. F. A. Feb'y 10, 1868.)

THO. L. JEWETT. [SEAL.]
W. R. McKEEN. [SEAL.]
G. B. ROBERTS. [SEAL.]
B. E. SMITH. [SEAL.]

[SEAL.] SAINT LOUIS, VANDALIA & TERRE HAUTE RAILROAD COMPANY,
By J. F. ALEXANDER, *President.*

Signed, sealed, and delivered in the presence of us—
ALBERT HEWSON.
G. MOODIE.
E. F. WINSLOW.

(Endorsed:) Filed July 14th, 1887. James T. Jones, clerk.

66 And afterwards, to wit, on the sixteenth day of July, in the June term of said court, in the year last aforesaid, the following proceedings were had in said court in said cause and entered of record, to wit:

Order Denying Motion for Receiver.

THE ST. LOUIS, VANDALIA & TERRE HAUTE RAILROAD COMPANY
vs.
THE TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY.
} In Chancery.

Now, on this day come the parties, by their respective solicitors, and there comes on to be heard the motion of the St. Louis, Vandalia & Terre Haute Railroad Company for the appointment of a receiver, by order of this court, to take possession of all the property and franchises of the said St. Louis, Vandalia & Terre Haute Rail-

road Company; and the court having heard the argument of counsel of the said parties on said motion and examined all the evidence offered with respect thereto, and the court being fully advised in the premises, it is ordered that the said motion for the appointment of said receiver be and the same is denied.

67 Then, afterwards, to wit, on the third day of September, in the year last aforesaid, came again the defendant, by its solicitors, and filed in the clerk's office of said court its demurrer to the bill of complaint herein; which said demurrer is in the words and figures following, to wit:

68 *Demurrer to Bill.*

In the Circuit Court of the United States for the Southern District of Illinois. In Chancery.

THE ST. LOUIS, VANDALIA & TERRE HAUTE RAILROAD COMPANY
vs.
THE TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY.

The demurrer of The Terre Haute & Indianapolis Railroad Company, defendant, to the bill of complaint filed in the above-entitled cause.

The said defendant, The Terre Haute & Indianapolis Railroad Company, by its solicitors, hereby demurs to the said bill of complaint and to the said several parts thereof hereinafter indicated, because the same are insufficient in law, and for causes of demurrer said defendant assigns the following reasons:

The entire bill is insufficient.

First. Because there is no equity disclosed on the face thereof.

Second. Because the complainant has a complete remedy at law for all said supposed grievances.

Third. If complainant ever had any right to proceed in equity on any of the grounds stated in the bill such right has been lost by long delay of complainant and its laches in that behalf.

Fourth. The bill is bad, because it is multifarious, in this, that it seeks to compel the cancellation of an agreement and the enforcement thereof in the same proceeding, and also seeks an accounting by the defendant as a supposed trustee.

Fifth. The bill is contradictory and inconsistent for the reasons last aforesaid.

The said defendant demurs separately to that part of the bill which prays a cancellation of the instrument described therein as a lease for the following reasons:

69 First. Because the bill does not disclose any equity entitling the complainant to such cancellation.

Second. Because of the laches of complainant in failing to proceed years ago in that behalf.

The defendant also demurs separately to that part of the bill which prays an accounting against the defendant, and for causes of such demurrer assigns the two reasons last aforesaid.

For said reasons, and for other reasons apparent on the face of the said bill, the defendant says that the same and the said several parts thereof are insufficient in law, and defendant prays judgment of the court whether it shall be required to — other or further answer to said bill or any part thereof.

GREENE & HUMPHREY,
F. M. RAMSEY,
JOHN G. WILLIAMS,
Solicitors for the Terre Haute & Indianapolis Railroad Company.

GEO. HOADLEY,
Of Counsel.

John G. Williams respectfully shows to the court that he is the general counsel for the Terre Haute & Indianapolis Railroad Company, defendant in the above-entitled cause, and certifies that, in his opinion, the demurrer to the said bill of complaint of the St. Louis, Vandalia & Terre Haute Railroad Company is well founded in point of law.

JNO. G. WILLIAMS.

70 STATE OF INDIANA, }
County of Vigo, } *ss:*

Before me, a notary public in and for the said county and State, at my office, in Terre Haute, Indiana, came John G. Williams, and, being by me first duly sworn, he deposes as follows:

I, John G. Williams, upon my oath do say that I am general counsel of the Terre Haute & Indianapolis Railroad Company, defendant in the above-entitled cause, and that the foregoing demurrer has been interposed in behalf of said defendant company; and I further say that the said demurrer is not and has not been interposed for delay.

JOHN G. WILLIAMS.

Subscribed and sworn to before me this 18th day of August, A. D. 1887.

[SEAL.] JOHN R. HAGER,
Notary Public.

(Endorsed:) Filed September 3rd, 1887. James T. Jones, clerk.

71 And afterwards, to wit, on the thirteenth day of September, in the June term of said court, in the year last aforesaid, the following further proceedings were had in said court in said cause and entered of record, to wit:

Order for Hearing Demurrer.

ST. LOUIS, VANDALIA & TERRE HAUTE RAILROAD COMPANY
v.
TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY. } In Chancery.

By consent of parties, by their solicitors, the demurrer to bill herein is set for hearing on Tuesday, the 27th day of September inst.

Then afterwards, to wit, on the eleventh day of January, in the January term of said court, in the year of our Lord one thousand eight hundred and eighty-eight, the following further proceedings were had in said court in said cause and entered of record, to wit:

Decree Sustaining Demurrer & Leave to Amend Bill.

ST. LOUIS, VANDALIA AND TERRE HAUTE RAILROAD COMPANY
vs.
TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY. } In Chancery.

72 This cause came on to be heard on the demurrer of the defendant to the bill of complaint, and thereupon, the court being fully advised in the premises, it is ordered, adjudged, and decreed that the said demurrer be sustained; whereupon the complainant asks leave to amend its said bill, which is granted, and thereupon the said complainant files its amended bill.

73 UNITED STATES OF AMERICA, *Southern District of Illinois,* } *ss:*

In the United States Circuit Court for the Southern District of Illinois.

To the honorable judges of the circuit court of the United States for the southern district of Illinois, in chancery sitting:

The St. Louis, Vandalia and Terre Haute Railroad Company brings this its bill against the Terre Haute and Indianapolis Railroad Company; and thereupon your orator, The St. Louis, Vandalia and Terre Haute Railroad Company, complains and says:

First. That it is a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, a citizen of said State, and a resident of the southern district thereof, and that said defendant, The Terre Haute and Indianapolis Railroad Company, is a corporation duly organized and existing under and by virtue of the laws of the State of Indiana and a citizen of the State of Indiana.

Second. Your orator further shows that your orator was originally created a corporation of said State of Illinois by an act of the General Assembly thereof passed and in force on the tenth day of February,

1865, entitled "An act to incorporate the St. Louis, Vandalia and Terre Haute Railroad Company," which act of incorporation was subsequently amended by said General Assembly by an act passed and in force on the eighth day of February, 1867, entitled "An act to amend an act entitled 'An act to incorporate the St. Louis, Vandalia and Terre Haute Railroad Company;'" by which act and amendment
74 thereof your orator was empowered and authorized to locate, construct, furnish, and maintain a railroad commencing on the left bank of the Mississippi river, opposite St. Louis, running thence easterly through Greenville, the county seat of Bond county, and through Vandalia, by the most eligible route, to a point on the Wabash river which it might deem the most convenient for extending the same to the city of Terre Haute, in the State of Indiana: Provided, however, That if your orator should find it impracticable to reach the west bank of the Wabash river for its eastern terminus, as above provided, it should be lawful for it to make the State line at any practicable point in the direction of said city of Terre Haute, in said State of Indiana, its eastern terminus. And your orator was further authorized and empowered by said act and the amendment thereto to establish, take, and receive such rates of tolls for passengers and property conveyed or transferred upon said road, when constructed, as the directors of your orator should from time to time establish; also to borrow money from time to time for the purpose of constructing said road and furnishing the same with cars, locomotives, etc., necessary to carry on the operation of your orator and to issue its corporate bonds therefor. By the said acts aforesaid it was further provided that the capital stock of your orator should be three million dollars ($3,000,000), which might be thereafter increased by a vote of the majority of the stockholders; that said capital stock should be divided into shares of one hundred dollars ($100) each, and that your orator should annually or semi-annually make such dividends as it might deem proper of the net profits, receipts, or income of your orator among its stockholders in proportion to their respective shares of stock; and said acts further conferred upon your orator all the rights, privileges, powers, and immunities commonly given to or exercised and enjoyed by railroad companies in said State of Illinois, whether the same were directly expressed in
75 said acts or not; but by neither of said acts, nor by any rights, privileges, and powers commonly given to or exercised and enjoyed by railroad companies in the State of Illinois, was your orator authorized to lease its railroad, or by any other contract or conveyance to part with the entire possession, control, and use of its property and franchises, or to deprive itself of and vest in others the power of control in the management of its road and other property and in the exercise of its franchises, including the right to impose and collect tolls for the transportation of passengers and freight indefinitely or for any fixed period of time; all of which matters and things will more fully and at large appear by reference to copies of said acts, hereto attached and marked, respectively, Exhibits "A" and "B," and which your orator prays may be taken as

parts of this bill as fully as if the same were here particularly set out.

Third. Your orator further shows that said defendant, The Terre Haute and Indianapolis Railroad Company, was originally created a corporation, under the name of the Terre Haute and Richmond Railroad Company, by an act of the General Assembly of the State of Indiana, passed January 26th, 1847, entitled "An act to incorporate the Terre Haute and Richmond Railroad Company," with full power and authority to locate and construct a railroad track commencing at some point on the western line of the State of Indiana and running on the best ground for the interest of the company, defendant, and public convenience, eastwardly through Terre Haute to Richmond, in said State of Indiana; and by said act it was further provided that the capital stock of said defendant should be eight hundred thousand dollars ($800,000), divided into shares of fifty dollars ($50) each, with power to said defendant to increase the same, and that afterwards said General Assembly of said State of Indiana, by an act passed on the 6th day of March,
76 1865, entitled "An act to change the name of the Terre Haute and Richmond Railroad Company, and to give further time for the completion of the line of said road from Terre Haute to a point on the western line of the State of Indiana," changed the name of said defendant from the Terre Haute and Richmond Railroad Company to the Terre Haute and Indianapolis Railroad Company, but that neither by said original act of incorporation nor said amending act, nor by any law of the said State of its incorporation, was or is said defendant authorized to make, execute, or accept any lease, contract, or other conveyance by which it, the said defendant, should acquire or obtain, either indefinitely or for a fixed term, the ownership, management, or control of any railroad located beyond the limits of said State of Indiana, as will more fully and at large appear by reference to copies of said acts hereto attached and marked, respectively, Exhibits "C" and "D," and which your orator prays may be taken as parts of this bill as fully as if the same were particularly set out.

Fourth. Your orator further shows that shortly after the passage of said act of the tenth day of February, 1865, its capital stock was duly subscribed for, and it proceeded as therein and in said amending act authorized to construct a line of railroad from the city of East St. Louis to a point on the eastern boundary of the State of Illinois, through the following counties, to wit, St. Clair, Madison, Bond, Fayette, Effingham, Cumberland, and Clark, and the towns of Greenville and Vandalia, the length of said line of road being one hundred and fifty-eight (158) miles, more or less, and on or about the first (1st) day of July, 1870, completed said line of railroad, together with such wood, water, passenger, and freight stations, buildings, shops, fixtures, sidings, and other appurtenances as were necessary for the convenient and profitable operation of the
77 same, and also, on or about the date last aforesaid, equipped and furnished the said railroad with the necessary locomo-

tives, cars, and other rolling stock required to successfully operate said line of road.

Fifth. Your orator further shows that, for the purpose of constructing said road and furnishing the same with cars, locomotives, and other machinery necessary to carry on the operation thereof, your orator, on or about the sixth day of April, 1867, duly made and executed, under your orator's corporate seal, attested by your orator's president and treasurer, as duly authorized by your orator's board of directors, and delivered to Joseph T. Thomas your orator's certain indenture of a mortgage or deed of trust, bearing date the first day of January, 1867, whereby your orator mortgaged and conveyed in trust to said Thomas, as trustee, your orator's said line of railway and the said appurtenances and equipments thereof in order to secure the payment of the principal and interest of a certain then contemplated issue of bonds of your orator to the aggregate amount of one million nine hundred thousand dollars ($1,900,000) in bonds of not less than five hundred dollars ($500) each, to be dated the said first day of January, 1867, and payable thirty (30) years thereafter, with interest at the rate of seven (7) per cent. per annum, payable semi-annually on the first days of January and July in each year, by which indenture it was, among other things, further provided that for the further security and ultimate redemption of the aforesaid bonds your orator, its successors or assigns, would, on or before the first (1st) day of July in each and every year until the principal of said bonds should be wholly paid, beginning on the first day of July, 1872, set apart and appropriate out of the earnings of said railroad and on or before said day deposit with and pay to a commissioner, to be hereafter appointed by your orator, the full sum of
twenty thousand dollars ($20,000), which sum, together with
78 all accumulations of interest thereon that might actually come into the hands of said commissioner, should be invested by him in the purchase of the bonds in said indenture designated, if the same could be purchased at the par value thereof and interest, and, if not, in the purchase of such other bonds or securities as your orator and said Thomas might direct, giving preference, however, to the securities of the United States of America; and by said indenture it was further provided that in case of default in the payment of any of the interest or principal of said bonds as the same should become payable, or in case of a failure of your orator to make the yearly payments of twenty thousand dollars ($20,000) into the sinking fund, as in said indenture required, and the continuance of said default for a period of six months thereafter, it should be lawful for said trustee, and upon the request in writing by a certain number of said bondholders in said indenture specified, it should be the duty of said trustee to make entry upon, or without entry, to sell and dispose of all and singular the premises and property in said indenture conveyed, and the equity of redemption of your orator, its successors or assigns, therein, at public auction, in the manner prescribed in said indenture, and, upon said sale, to make and deliver to the purchaser or purchasers thereof good and sufficient deed or deeds in law for the same, which sale, when made, should be a per-

petual bar, both in law and equity, against your orator, its successors and assigns, and all persons claiming said property by, from, under, or through your orator or them, and to apply the proceeds of said sale, after deducting the expenses thereof, or so much of said proceeds as might be necessary to the payment of the principal and interest of said bonds, whether said principal was due or not. It was further provided in said indenture that in the mean time, and until default should be made in the payment of the princi-
79 pal or interest of said bonds or some of them or some part thereof, or in the payments into the sinking fund, or in some of the covenants and agreements in said indenture contained, it should be lawful for your orator and its successors, peaceably and quietly, to have, hold, use, possess, and enjoy said premises and appurtenances in said indenture mentioned, and to operate and maintain the said railroad and property, and to receive the incomes, tolls, rents, issues, and profits thereof to their own use and benefit, without any hindrance or interruption by suit or disturbance whatever, of or by said Joseph T. Thomas, trustee, his successors in trust, or any other person or persons claiming by, through, or under him, all of which matters and things will more fully and at large appear by reference to a copy of said indenture, hereto attached, marked Exhibit "E," and which your orator prays may be taken as a part of this bill as fully as if the same were particularly set out.

Sixth. Your orator further shows that, for the purpose of constructing said road and furnishing the same with cars, locomotives, and other machinery necessary to carry on the operation thereof, your orator, on or about the 13th day of March, 1868, duly made and executed, under its corporate seal, attested by your orator's president, as duly authorized by your orator's board of directors, and delivered to J. Edgar Thompson and Chauncy Rose, your orator's certain other indenture of mortgage or deed of trust, bearing date the day last aforesaid, conveying to said Thompson and Rose, as trustees, its said line of railway and appurtenances and equipments thereof in order to secure the payment of the principal and interest of a certain then contemplated issue of the bonds of your orator to the aggregate amount of two million six hundred thousand dollars ($2,600,000), said bonds to be in sums of one thousand dollars ($1,000) each, to be dated of even date with said indenture
80 and payable thirty (30) years after the first day of May, 1868, with interest at the rate of seven (7) per cent. per annum, payable semi-annually on the first days of May and November in each year, and by said indenture it was further provided that if there should be default in the payment of the interest or principal of any of said bonds according to their terms, and such default continue for the period of six (6) months thereafter, it should be lawful for and, upon the request of the holder of a certain amount of said bonds in said indenture specified, it should be the duty of said trustees to make entry upon or without entry to sell and dispose of all and singular the premises in said indenture conveyed or intended to be conveyed, and all right, benefit, and equity of redemption of your orator, its successors or assigns, at public auc-

tion, at the place and in the manner in said indenture designated, and to make and deliver to the purchaser or purchasers thereof a good and sufficient deed or deeds in fee simple for the same, which sale, when made, should be a perpetual bar in law and equity against your orator, its successors or assigns, and all persons claiming by, through, or under your orator or them, and to apply the proceeds of said sale, after deducting the just allowances for expenses attorneys' fees, etc., or so much thereof as might be necessary, to the payment of the interest and principal of said bonds, whether said bonds be by their terms then due or not; and that it was further provided in said indenture that in the mean time and until default should be made in the payment of the principal or interest of said bonds or of some part thereof, or of some of the covenants or agreements of your orator in said indenture contained, it should be lawful for your orator and its successors and they should have the right peaceably and quietly to have, hold, use, possess, and enjoy said rights and property, franchises, premises, and appurtenances in said indenture mentioned, and to operate and maintain said railroad
81 and property and to receive the income, tolls, rents, issues, and profits thereof to your orator's own use and benefit, without any hindrance or interruption, suit or disturbance, whatever by said trustees, their successors in trust, or any other persons lawfully claiming by, through, or under them or their successors or either of them; all of which matters and things will more fully and at large appear by reference to a copy of said indenture, hereto attached and marked Exhibit "F," and which your orator prays may be taken as a part of this bill as fully as if the same were particularly set out.

Seventh. Your orator further shows that after the two indentures of mortgage or deeds of trust heretofore mentioned in articles five and six of this bill were duly executed by your orator the same were duly delivered to the said trustees therein named, respectively, the trusts thereof duly accepted by them, respectively, and thereafter the said two indentures were duly recorded according to law in the several counties of said State of Illinois through or in which your orator's said line of railroad or any part thereof is situate, so as to make the same a valid lien thereon; said indenture, dated the first day of January, 1867, was duly recorded in all of said counties on or before the twelfth day of June, 1867, and said indenture, dated the thirteenth day of March, 1868, was duly recorded in Clarke county on the twenty-seventh day of May, 1868, and in all of the other said counties on or before the thirteenth day of May, 1879; that after the execution of said indentures aforesaid the bonds of your orator therein referred to, aggregating four million five hundred thousand dollars ($4,500,000), were duly executed and disposed of by your orator for a good and valuable consideration to divers persons and the proceeds thereof applied to the construction and equipment of said railroad; that none of said bonds have been since paid,
82 nor has there been created or is there now existing any sinking fund as provided in said indenture, dated the first day of January, 1867, but all of said bonds are still outstanding and un-

paid, in the hands of divers persons, and are subsisting obligations of your orator, and that said two indentures, given as aforesaid to secure the payment of said bonds, have not been in any way released or discharged, but are now subsisting liens upon the property of your orator for the purposes therein set forth.

Eighth. Your orator further shows that prior to the completion of its said road as aforesaid, on or about the 10th day of February, 1868, one J. F. Alexander, who was at that time president of of your orator, acting under the authority which the then existing board of directors of your orator assumed or attempted to confer upon him, executed with said defendant a pretended lease, which is in words and figures following, to wit:

Whereas a contract for the construction and equipment of the St. Louis, Vandalia and Terre Haute railroad, belonging to a corporation of the State of Illinois, has been entered into this day, by which arrangements have been made to complete and equip said road between East St. Louis and the State line of Indiana in the manner set forth in said contract;

And whereas the Terre Haute and Indianapolis Railroad Company, a corporation of the State of Indiana, has proposed to construct without delay a first-class railroad, being an extension of their present road from Terre Haute to the State line of Indiana, upon such location as will connect properly and directly with the St. Louis, Vandalia and Terre Haute railroad at the State line of Illinois;

And whereas it is desirable that the said lines when con-
83 nected should be operated by the Terre Haute and Indianapolis Railroad Company as one road between Indianapolis and St. Louis, and the said Terre Haute and Indianapolis Railroad Company having proposed to lease and operate the said St. Louis, Vandalia and Terre Haute railroad for a period of nine hundred and ninety-nine (999) years: It is therefore agreed, first—

That upon completion of the road between East St. Louis and the State line of Indiana, the Terre Haute and Indianapolis Railroad Company shall take charge of and operate the same with its equipment for a period of nine hundred and ninety-nine (999) years, for which they shall be allowed sixty-five (65) per cent. of the gross receipts from all traffic moved over the line or business done thereon and from the property of the company, as a consideration for working and maintenance expenses, the remaining thirty-five (35) per cent. to be appropriated as follows:

1st. To the payment of interest on the first and second mortgage bonds of the St. Louis, Vandalia and Terre Haute Railroad Company according to their legal priority.

2d. All the surplus of said thirty-five (35) per cent. to be paid over to the St. Louis, Vandalia & Terre Haute Railroad Company (semi-annually), to be disposed of by it for the benefit of its stockholders.

If the thirty-five (35) per cent. should from any cause not be sufficient in amount to protect the interest on mortgage bonds and sinking funds therefor as they mature from time to time, together

with the payment of taxes and proper cost of maintaining organization, so that the rights of stockholders may be preserved, then and in that event the lessee shall advance for the company whatever amounts may be needed, to be accounted for under the yearly averages of this lease during the contract.

84 It is further agreed that the Terre Haute and Indianapolis Railroad Company as lessee shall enjoy all the rights, powers, and privileges of the St. Louis, Vandalia & Terre Haute Railroad Company, so far as the same may be needful to maintain and operate said railroad; also to impose and collect tolls and rates for transportation, and to do all other acts and things as fully and as effectually as the said St. Louis, Vandalia and Terre Haute Railroad Company could do if operating said line, it being always understood and agreed that the gross proceeds from through or joint traffic or business shall be divided on the *pro rata* basis per mile for distances moved on the roads of each party.

In witness whereof the parties, respectively, have hereunto affixed, this the tenth (10th) day of February, A. D. 1868, their official signatures and seals under the authority of their boards of directors.

[Seal St. L., V. & T. H. R. R. Co.]

THE ST. LOUIS, VANDALIA AND TERRE HAUTE RAILROAD COMPANY,
By J. F. ALEXANDER, *President.*

[Seal T. H. & I. R. R. Co.]

THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY,
By W. R. McKEEN, *President.*

Sealed and delivered in presence of—
E. F. WINSLOW.

That the first and second mortgage bonds of your orator, referred to in said pretended lease, are the same bonds secured by the said two indentures set forth in articles five and six of this bill, and

85 that afterwards, on or about the 12th day of January, 1869, the then board of directors of your orator passed a certain resolution, wherein and whereby they undertook to authorize the president of your orator to change the terms of said lease so that where "sixty-five (65) per cent. of the gross receipts" occurs therein it should read "seventy (70) per cent.," but that if the working and maintenance expenses of said railroad should be less than seventy (70) per cent. of the gross receipts aforesaid, then all of such excess should be paid over to your orator, as will more fully and at large appear by reference to a copy of said resolution, hereto attached and marked Exhibit "G," and which your orator prays may be taken as a part of this bill as fully as if the same were particularly set out, which said modification was thereafter assented and agreed to by said defendant.

Ninth. Your orator further shows that at the time of the execution and delivery of said pretended lease there was in force in said State of Illinois an act of the General Assembly thereof, passed Feb-

ruary sixteenth (16th), 1865, whereby it was enacted that "it shall not be lawful for any railroad company of Illinois, or for the directors of any railroad company of Illinois, to consolidate their road with any railroad out of the State of Illinois, or to lease their road to any railroad company out of the State of Illinois, or to lease any railroad out of the State of Illinois without having first obtained the written consent of all the stockholders of said roads residing in the State of Illinois, and any contract for such consolidation or lease which may be made without having first obtained said written consent, signed by the resident stockholders in Illinois, shall be null and void, as will more fully and at large appear by reference to a copy of said act, hereto attached and marked Exhibit "H."

And your orator avers that at the time of the execution of said pretended lease a large number of the stockholders of your orator were resident in the said State of Illinois, among
86 whom were the following persons, then residing at the various places named, as follows:

Smith & Son, Greenville, Illinois.
M. B. Chittenden, Greenville, Illinois.
George W. Hill, Greenville, Illinois.
A. G. Henry, Greenville, Illinois.
D. H. Kingsbury, Greenville, Illinois.
James McFerrin, " "
John A. McNeely, " "
Joseph McCully, " "
S. P. Moore, " "
B. F. Mayo, " "
Andrew Rea, " "
William S. Smith, " "
Henry W. Waite, " "
Richard S. Waite, " "
Foster F. Waite, " "
George Winters, Marshall, Illinois.
W. C. Whitlock, " "
Thomas Turner, " "
William Shaw, " "
R. R. Scott, " "
Dean Andrews, " "
A. B. Briscoe, " "
Lyman Booth, " "
J. R. Crosley, " "
G. W. Cooper, " "
Thomas Cole, " "
James Dawson, " "
C. & G. Duncan, " "
R. L. Dulaney, " "
Martin Flener, " "
David Guard, " "
John Gamble, " "
Justin Harlan, " "
William Kimlin, " "

87 Darius Legore, Marshall, Illinois..
E. B. Moore, " "
Jonathan Rains, " "
William Redick, " "
John Schofield, " "
Henry Wembeimer, Highland, Illinois.
Joseph Harnish, " "
Lorenz Marxer, " "
Francisco Pendzniska, " "
Charles H. Seybt, " "
Benjamin Brown, Pocahontas, Illinois.
Mrs. A. S. Johnson, " "
W. F. Brattner, " "
Charles Pickering, " "
Mrs. L. Redfearn, " "
Lee Waite, " "
Mrs. Mary C. Todd, East St. Louis, Illinois.
Town of Vandalia, Illinois.
Bond county, Illinois.
Jacob Cremer, Collinsville, Illinois.
Joshua S. Peers, " "
Martin Ruch, Saline, Illinois.
Lewis S. Seaman, Shelbyville, Illinois.
Fritz Pagan, Highland, Illinois.
David Goebel, Pocahontas, Illinois.

And that neither at the time of the execution of said lease nor at any subsequent time did all or any of said stockholders resident in said State of Illinois consent, in writing, to the execution of said pretended lease aforesaid, nor did said stockholders of your orator, at any stockholders' meeting, held either before or subsequent to the execution of said pretended lease, authorize, confirm, or ratify the execution thereof.

Tenth. Your orator further shows that after the execution
88 of said pretended lease, and as soon as the construction and equipment of said road of your orator had been completed as aforesaid, and on or about the first day of July, 1870, the said defendant, claiming the right so to do by reason of and under said pretended lease, entered into possession and assumed and took the complete control and use of all of your orator's said railroad, together with all its wood, water, passenger, and freight stations, buildings, fixtures, shops, sidings, and other appurtenances, and also its locomotives, cars, and other rolling stock, machinery, tools, and other utensils and equipments, and all other property of your orator of whatsoever name, nature, kind, and description, and said defendant has from that time continuously to the present day retained and still retains the exclusive possession and control thereof, and from the time when it so took possession of your orator's said property as aforesaid said defendant has been continuously and now is exercising all the rights, powers, and privileges of your orator under its said franchises, and has been and now is maintaining, operating, managing, and controlling your orator's said railroad and other property and impos-

ing, collecting, and receiving tolls and rates accruing for the transportation of passengers and freight over your orator's said road, and that the sum so received by said defendant and appropriated to its own use and that of its stockholders from the tolls and other receipts of your orator's said property, franchises, rights, powers, and privileges now aggregate more than twenty-one million six hundred thousand dollars ($21,600,000).

Eleventh. Your orator further shows that it is advised by counsel that said defendant in executing and accepting said pretended lease and in taking possession of and operating under said pretended lease said railroad and other property, rights, powers, and privileges of your orator exceeded the powers and rights conferred upon it by its charter and the laws of the State of Indiana and acted wholly without authority of law or right.

89 And your orator is further advised by counsel that neither said Alexander, as the president of your orator, nor the board of directors of your orator that was in existence at the time of the execution of said pretended lease nor any other board of directors of your orator nor your orator had at the time of the execution of said pretended lease, nor at any other time, power and authority to execute a lease of its property as in said pretended lease contemplated, nor could your orator, either through its said president or its said board of directors nor otherwise, make any conveyance or contract whereby it could for a term of years or indefinitely part with the complete possession, control, and use of your orator's said property and franchises, or whereby it could for a like period transfer to the defendant or any other non-resident corporation all its rights, powers, and privileges so far as the same might be needful to operate and maintain said railroad or its right to impose and collect tolls and rates for transportation, and do all other acts and things incident to the operation of said railroad, and that said pretended lease for nine hundred and ninety-nine (999) years is an attempt on the part of your orator to part with and divest itself of the entire possession and control of the property and franchises of your orator, including all its rights, privileges, powers, and immunities incident to the management and control of its said property for such an extended period of time as virtually amounts to a sale in perpetuity and to an absolute surrender of its property and practical surrender of its entire franchise to a corporation foreign to the State of Illinois, and incapacitates your orator from fulfilling those duties and obligations to the said State of Illinois and the inhabitants thereof which are imposed upon it by the acceptance of its charter, which neither your orator nor any of its officers or directors could lawfully do.

90 And your orator is further advised, even if either your orator or its said officers or directors could lawfully execute such a contract or conveyance as said pretended lease, that said pretended lease was not executed in the manner in which alone such a lease could be executed under the laws of the State of Illinois, and that said pretended lease is absolutely null and void and in no way binding upon your orator or said defendant.

Twelfth. Your orator further shows that said defendant, by taking possession as aforesaid of your orator's railroad and property without right as aforesaid, became in equity the trustee of your orator, and as such was and is liable in equity to account to your orator for all said property and all the tolls, issues, emoluments, and receipts, of whatever name and nature, said defendant has or ought to have in any way collected or received from the possession, control, operation, and management of your orator's railroad and property aforesaid, and to restore immediately to the possession and control of your orator all said property now remaining in the possession or under the control of said defendant, and to pay over to your orator all of said receipts aforesaid, after deducting therefrom said defendant's reasonable disbursements in and about the care, management, operation, and maintenance of your orator's aforesaid railroad and property, and also such further sum as shall be the fair value or equivalent of so much of said property, if any, as said defendant has no longer in its possession or control.

Thirteenth. Your orator further shows that heretofore at various times it has requested of the said defendant that it, said defendant, turn over to your orator your orator's said railroad and such of said other property so taken possession of by said defendant aforesaid as it had in its possession or control, but that said defendant has failed and refused and still refuses to comply with your orator's said rea-
91 sonable request, and insists upon the validity of said pretended lease and upon its right during said entire period of nine hundred and ninety-nine (999) years, mentioned in said lease, to retain the possession, operate, control, and receive the income for its own interest and use of said property so unlawfully obtained by said defendant from your orator, and to enjoy all the rights, powers, and privileges of your orator under its franchise, so far as the same shall be needful to maintain and operate said railroad; and because said defendant has in its possession and control all of your orator's property of every kind and your orator has no other source of revenue, your orator has been unable to apply any money whatever to the creation of a sinking fund, as required of it by said indenture of mortgage or deed of trust dated the first (1st) day of January, 1867.

92 Fourteenth. And your orator further says that it has no doubt that when said board of directors of your orator existing at the time of the making of said pretended lease authorized the execution of, and said Alexander, the then president of your orator, executed, said pretended lease as aforesaid and allowed said defendant to take possession of your orator's said property as aforesaid, they supposed that your orator and they, on its behalf and as its directors and officers, had the lawful right to authorize the execution of and to execute the same, and your orator did not know until recently that said lease was null and void, and that your orator through its said directors and officers and by the execution of said pretended lease had violated the law and exceeded its powers, and for this reason your orator has not heretofore instituted legal proceedings for the purpose herein sought; but your

orator has been recently advised by its counsel that such lease is null and void, and that it is the duty of your orator at once to repudiate said pretended lease and to resume the possession, control, and use of its said property and franchises, and thereby at once place itself in a position to fulfill, perform, and discharge those duties and obligations to the public which your orator assumed by the acceptance of its charter.

Fifteenth. Your orator further says that great and irreparable injury will be done your orator and its stockholders unless your orator be restored to the immediate possession, control, and use of its said property, powers, rights, and franchises and have the other relief herein prayed; that it is advised by its counsel that by the execution of said pretended lease it has rendered itself liable to have its charter and corporate rights taken from it by the State of Illinois for an abuse of its franchise; that its said railroad and other property is of great value, exceeding the sum of eight
93 million five hundred thousand dollars ($8,500,000), and yields a large annual income, which income, under careful and prudent management, could be largely increased; that the present net income of said railroad is more than sufficient to pay the interest on its bonded indebtedness, and to comply with the requirements of said first-mortgage indenture, dated said first (1st) day of January, 1867, concerning the creation of a sinking fund; that by reason of this failure to provide for a sinking fund the bondholders secured by said first mortgage may at any time institute proceedings to foreclose the same, and thereby throw the affairs of your orator into great confusion, and your orator thereby be brought to a state of insolvency.

Your orator further avers, upon the advice of counsel, that if said defendant is permitted to remain in the possession and control of the said railroad and appurtenances and to receive the earnings of the same under said *ultra vires* contract of lease your orator will have no means of enforcing the provisions of the same against said defendant, and that to allow said defendant to avail itself of said *ultra vires* contract of lease, which cannot be enforced against it, is doing your orator an irreparable injury, even if it could compel the said defendant under an implied obligation to account for the profits derived from the possession, use, and control of your orator's railroad and appurtenances.

Sixteenth. Your orator further says that the protection and enforcement of the rights of your orator in the premises demand the taking of an account between your orator and said defendant of the moneys received by said defendant in the operation of your orator's said railroad, etc.; that this will require the investigation of long and complicated accounts covering a period of nearly seven-
teen (17) years, the expenditure and receipt of large sums of
94 money, and involve a great many separate items and separate accounts, and your orator is entitled to have said defendant account also for the property of your orator so taken as aforesaid by said defendant under said pretended lease, and a court of law affords no adequate means for the taking of either of such accounts,

and that said pretended lease being null and void and still outstanding and claimed by said defendant to be valid is and, unless delivered up and canceled, will continue to be a cloud upon the title of your orator to its said property during the entire period covered by said pretended lease, and such cloud is liable to seriously embarrass your orator in the ownership and use of its said property, and a court of law has no jurisdiction adequate to direct a surrender and cancellation of said pretended lease; that said defendant is a non-resident of this district and State and has no property therein out of which your orator could secure satisfaction of any decree or judgment obtained in this court; that large sum of money are daily accruing from tolls and charges in the operation of your orator's said railroad, which are being collected and received by said defendant, by reason of its having the possession of said road, and are being withdrawn by said defendant from the jurisdiction of this court; that said defendant will continue during the litigation concerning said pretended lease to collect and appropriate to its own use and withdraw from the jurisdiction and reach of the process of this court such large emoluments and tolls as will accrue during said litigation, to the great and irreparable injury of your orator, unless the possession of said railroad and other property shall be restored to your orator and said defendant shall be restrained from further interfering therewith by the injunction of this court, or a receiver shall be appointed to take possession and control of said property, operate said railroad, and receive the tolls and emoluments therefrom *pendente lite*.

95 In tender consideration whereof, and forasmuch as your orator is remediless in the premiess at and by the strict rules of the common law, and is relievable only in a court of equity, where matters of this nature are properly relievable, to the end thereof that your orator may have the relief herein prayed, and that the said Terre Haute and Indianapolis Railroad Company, the defendant herein, may answer make in the premises (but not under oath, answer under oath being hereby waived); and,

1st. That by the decree of this court the said pretended lease may be declared to be null and void, and that said defendant be decreed to cancel and surrender the same.

2d. That said defendant be decreed to yield and deliver to your orator said railroad and said other property of your orator so taken possession of by said defendant under said pretended lease, or so much thereof as shall, upon the filing of this bill, be in the possession or under the control of said defendant, together with any and all equipment belonging to your orator's said railroad, whether originally delivered to defendant under said pretended lease or subsequently acquired to replace equipment worn out or destroyed, and that thereafter said defendant be perpetually restrained by the injunction of this court from interfering with or disturbing your orator in its possession, control, and operation of said railroad and other property.

3d. That an account may be taken, by and under the direction of this honorable court, of the amounts which said defendant has

received or might have received, by due skill and diligence, from the use, operation, control, and management of the said railroad and other property of your orator so attempted to be demised by said pretended lease from the time said defendant acquired possession
96 and control thereof to the time of the surrender of the same to your orator or the receiver appointed herein; that an account be taken of the reasonable expenses and disbursements necessarily expended by said defendant in the operation and maintenance of the said railroad and other property aforesaid, and that said defendant be decreed to pay to your orator the amount so found to have been received by it as aforesaid, together with the fair value of such of the aforesaid property, if any, as shall not be in the possession or control of said defendant at the time of the filing of this bill, less defendant's said reasonable disbursements and expenses.

5th. That said defendant, its officers, agents, attorneys, and servants, by the writ of injunction issued out of this court, be restrained during the pendency of this suit, and until the final determination thereof, from collecting or receiving any of the tolls or emoluments accruing from the operation or use of your orator's said railroad or other property, or from interfering in any manner whatever with the management and control thereof by your orator, or its possession of said railroad and other property, or that a receiver, *pendente lite*, be appointed by this court to take possession of said railroad and other property, with power to operate and maintain the same, collect the tolls and other receipts therefrom, and with the usual powers of receivers in such cases.

6th. And that your orator may have such other and further relief in the premises as to the court shall seem meet and equity may require, etc.

97 May it please your honors to grant unto your orator a writ of subpœna, to be directed to the said Terre Haute and Indianapolis Railroad Company, thereby commanding it, at a certain time and under a certain penalty therein to be limited, personally to appear before this honorable court, and then and there full, true, direct, and perfect answer make to all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree therein as to this honorable court shall seem meet, etc., etc.

[Seal St. Louis, Vandalia & Terre Haute R. R. Co.]

THE ST. LOUIS, VANDALIA & TERRE HAUTE RAILROAD COMPANY.
THOS. D. MESSLER, *President.*

Attest: S. B. LEGGETT, *Secretary.*

J. T. BROOKS,
Solicitor for Complainant.
TRUMBULL, ROBBINS & TRUMBULL,
Of Counsel for Complainant.
McDONALD, BUTLER AND MASON,
Of Counsel for Complainant.

STATE OF PENNSYLVANIA, } ss:
County of Allegheny, }

Before me, the undersigned authority, personally came Thomas D. Messler, to me known as the president of the St. Louis, Vandalia and Terre Haute Railroad Company, and upon oath declares that he has heard read the foregoing bill of complaint and knows the contents thereof, and that in so far as the statements therein contained are made of his own knowledge the same are true, and
98 so far as the same are made upon information and belief he believes the same to be true.

THOMAS D. MESSLER.

Sworn to by the said Thomas D. Messler and by him subscribed in my presence this twenty-second day of June, in the year of our Lord eighteen hundred and eighty-seven.

[Seal M. H. Shane, Notary Public, Pittsburgh, Pa.]

M. H. SHANE,
Notary Public.

EXHIBIT "A" to Bill of Complaint.

ST. LOUIS, VANDALIA & TERRE HAUTE RAILROAD CO.
versus
TERRE HAUTE & INDIANAPOLIS RAILROAD CO.

An act to incorporate the St. Louis, Vandalia and Terre Haute Railroad Company.

SECTION 1. Be it enacted by the people of the State of Illinois represented in the General Assembly, That Henry Wing, F. W. Lytle, John S. Dewey, Andrew Mills, Solomon Kœpfli, Garrett Crownover, Curtis Blakeman, William S. Smith, Charles Hoiles, William S. Wait, John B. Hunter, Williamson Plant, Andrew G. Henry, Jediah F. Alexander, Nathaniel M. McCurdy, August H. Dieckmann, Ebenezer Capps, Frederick Remann, Mathias Fehren, Michael Lynch, Thomas L. Vest, J. F. Waschefort, Samuel Q. Quinn, Chauncey Rose, and Joseph H. Morgan, and such other persons as may associate with them for the purposes of this act, are hereby constituted a body corporate and politic, by the name and style of "The St. Louis, Vandalia and Terre Haute Railroad Company," with perpetual succession, and by that name and style shall be capa-
99 ble in law of taking, purchasing, and holding, leasing, selling, and conveying estate and other property, whether real, personal, or mixed, so far as the same may be necessary for the purposes hereinafter mentioned, and in their corporate name may sue and be sued, have a common seal, and may have and exercise all powers, rights, privileges, and immunities which are or may be necessary to carry into effect the purposes and objects of this act as the same are herein set forth.

SECTION 2. The said railroad company shall have full power and

authority to locate, construct, furnish, and maintain a railroad, with one or more tracks, commencing on the left bank of the Mississippi river, opposite St. Louis, running thence eastwardly through Greenville, the county seat of Bond county, and through Vandalia, by the most eligible route, to a point on the River Wabash which they may deem the most convenient for extending the same to Terre Haute, in Indiana, and for this purpose are authorized to lay out their said road in width not exceeding one hundred and fifty feet through its whole length, and, for the purpose of cuttings, embankments, and all necessary uses, may take as much more land as may be needed for the construction and security of said railroad.

SECTION 3. The capital stock of said company shall be three millions of dollars, which may be hereafter increased by a vote of a majority in interest of the stockholders at their annual meeting, or at a special meeting called for that purpose, and said capital stock shall be divided into shares of one hundred dollars each.

SECTION 4. No stockholder shall be held liable for the debts or other liabilities of the company beyond the amount of stock for which he may have subscribed.

SECTION 5. The immediate government and direction of said company shall be vested in nine directors, who shall be chosen annually by the stockholders, and hold their offices until a new board is chosen; but until the first choice of directors the corporators above named shall constitute the board of directors, with power to fill vacancies, and any seven of the same shall be a quorum, and may at any time after the passage of this act cause books to be opened for subscription to the capital stock of said company, at such times and places, according to such conditions and regulations, and under the supervision of such persons as they may direct.

SECTION 6. The said board of nine directors shall elect one of their number president, and choose a secretary and treasurer, each of whom shall be a stockholder in said company.

SECTION 7. The said road may be constructed and completed in sections of any prescribed length, to be determined upon by the directors, and any portion of the road so completed may be put in operation, with the privilege of collecting the charges for freight or passage.

SECTION 8. Whenever, in the opinion of the board of directors, a sufficient amount of capital stock has been subscribed, the work on said road may be commenced and prosecuted to its final completion.

SECTION 9. The said company shall have all the rights, privileges, powers, and immunities which are commonly given to or exercised and enjoyed by railroad companies in this State, whether the same be directly expressed in this act or not.

SECTION 10. Any incorporated city, town, or county, situate on or near the line of said road, may subscribe to the capital stock of said company any sum not exceeding one hundred thousand dollars, and may issue bonds in denominations not less than one hundred dollars, bearing interest at a rate not exceeding ten per centum per

annum, payable annually, which bonds may run any period not exceeding fifteen years, to be determined on by the county court,
101 board of supervisors, town trustees, or other proper authority issuing said bonds: Provided, That before said stock shall be subscribed an election shall be held in conformity with the laws in regard to ordinary city, town, or county elections, the usual notice having been given, and returns to be made in the usual way, at which election a majority of the legal voters voting on that question shall have voted in favor of such subscription; and to this end the county court, board of supervisors, town trustees, or other proper authority may, from time to time, order elections, specifying the amount proposed to be subscribed: And provided further, That the vote of the people of Bond county at the last November election in favor of subscribing one hundred thousand dollars to a railroad on exactly the same line with the same points, may be taken and held to be a vote for subscription of a like amount to the capital stock of the St. Louis, Vandalia, and Terre Haute railroad, if the county court of Bond county choose to do so rather than incur the expense of a new election.

SECTION 11. This act shall be deemed a public act and be in force from and after its passage.

Approved February 10th, 1865.

EXHIBIT "B" to Bill of Complaint.

ST. LOUIS, VANDALIA & TERRE HAUTE RAILROAD CO.
versus
TERRE HAUTE & INDIANAPOLIS RAILROAD CO.

An Act to amend an act entitled "An act to incorporate the St. Louis, Vandalia, and Terre Haute Railroad Company.

SECTION 1. Be it enacted by the people of the State of Illinois represented in the General Assembly, That the corporation heretofore organized and known as the St. Louis, Vandalia and Terre Haute Railroad Company, by virtue of an act approved Feb-
102 ruary 10, 1865, shall have all the powers, rights, privileges, and immunities which have been heretofore granted, and such other powers, rights, privileges, and immunities as are hereinafter provided for; and all subscriptions, donations, or gifts to the capital stock of said railroad company, whether made by individuals, townships, counties, or corporations, shall be and are by this act legalized, and the said company are hereby empowered and authorized to collect and use the same: Provided, That the general route of the said railroad shall not be changed: And provided further, That if the said railroad company shall find it impracticable to reach the west bank of the Wabash river for its eastern terminus, as provided for by the act of which this is an amendatory act, it shall be lawful for said company to make the State line, at any practicable point in the direction of the city of Terre Haute, in the State of Indiana, its eastern terminus.

SECTION 2. That all damage which shall be done to any lands or

property under the provisions of this act, or of the act of which this is an amendment, shall be ascertained and paid for in the manner hereinafter provided, and when such damage shall have been paid for or tendered the title to the said lands or property shall vest in fee simple in said railroad company. It shall be the duty of any judge of a circuit or county court of this State, upon the application of the said company, either in term time or vacation, at the cost of said company, to appoint three disinterested persons residing in the county where such lands are situate, not of kin to the owner or owners thereof, whose duty it shall be to view and examine all the lands or property taken in said county, with the buildings and improvements, if any, thereon, and to estimate the value of the same and all damages which the owner or owners thereof shall sustain or may have sustained by reason of the taking of the same for construction and benefit of said railroad or works appertaining thereto·
103 taking into consideration the advantages as well as the disadvantages of the same by means of the construction and operation of said road to the said owner or owners, and when said persons, who shall be called commissioners, are so appointed, they shall act in all cases arising in said county requiring the action of commissioners; but if, for any cause, either or all of said commissioners shall decline or become disqualified to serve or their place or places become vacant, such vacancy or vacancies shall be filled in the same manner as provided for the original appointments.

It shall be the duty of said company to give five days' notice of their application for the appointment of such commissioners, said notice to be by publication in some newspaper published in the county where said lands are situated, or if no newspaper be printed in said county, then in some newspaper published on the line of the road in the nearest adjacent county seat, and the certificate of the publisher or printer shall be legal evidence of such publication. The commissioners so appointed, before entering upon the discharge of their duties, shall take an oath before some officer authorized to administer oaths faithfully and according to their best abilities to examine the several pieces or parcels of lands or property so taken or acquired by said company and impartially to estimate and appraise the value of the same and the damage or injury which the owner or owners of each piece or parcel thereof shall have sustained or may sustain by reason of the taking and using thereof by the said railroad company over and above the benefits and advantages which said owner or owners shall or may derive from the construction of such railroad; thereupon such commissioners shall proceed to examine the premises and estimate the value of such lands and property and the amount of damages, if any, over and above the benefits and advantages which may accrue to such owner or
104 owners as aforesaid, and shall make a report in writing of such valuation of damages, if any, under their hands and seals to the clerk of the circuit court of the county where the land lies, and shall return the same within ten (10) days after making their appraisal; and it shall be the duty of said clerk to file the same, and in case no appeal shall be made within twenty days after

the filing of the said report, as hereinafter provided, then the said clerk shall record the same at the expense of said company, and judgment of the said court shall be entered thereon, either in term time or vacation, on motion of either party, for the amount of damages so reported: Provided, That either party may appeal to the circuit court of the county in which said lands shall lie within twenty days after said report shall have been filed in the clerk's office of said court, and such appeal shall be tried in the same manner as other issues are tried in said court, and the jury empaneled to try the same shall find the value of the land so taken or required by said company and the damages which the owner or owners thereof shall have sustained or may sustain by the taking of the same over and above the benefits which will accrue to such owner or owners from the construction of such railroad, and the judgment of the court shall be entered for the actual damages sustained. Such appeal shall be taken by giving notice thereof to the clerk of the said court in writing, and thereupon the clerk shall enter the same upon the docket of said court, setting down the railroad company as defendant and the said claimant or claimants as plaintiff: Provided, also, That it shall not be lawful for the said commissioners or the said court to proceed in the assessment of damages or in the valuation of lands or material as aforesaid in the absence of the owner or owners thereof, his, her, or their agents or attorneys, unless it shall be shown to them by competent testimony that the said owner or owners are non-residents or are absent from the State of Illinois, or that the said owner or owners have had at least five days' notice in writing of the time and place at which such assessment or valuation was to be made, which notice shall be served at their last or usual place of residence, with some person of suitable age and discretion; and if the said owner or owners shall be minors or *non compos mentis* the service of the notice may be made on their guardian or trustee, if there be any, or in such manner as the court or judge appointing said commissioners shall direct; and if said owner or owners shall be non-resident or absent from the State or his residence unknown the service of the notice may be made by publishing the same in a newspaper in said county for two successive weeks: Provided, also, That upon the making and filing of any report as aforesaid and the payment or tender of the amount of any valuation or appraisal specified therein to the owner or owners of any such lands, his, her, or their legal representatives, or on the payment of the amount of such valuation or appraisal to the clerk of the court to which any appeal under this act may have been taken to abide the issue of such appeal, the said company, their agents, or the contractors for making or repairing said railroad, may immediately take and use the same without awaiting the issue of any appeal brought thereon. Whenever any judgment shall have been entered, as hereinbefore provided, for the value of any lands or for any damages for the taking and using of the same and the amount specified in said judgment shall have been paid or tendered to the owner or owners of such lands, his, her, or their legal repre-

sentatives, on the payment of the amount specified in such judgment or in such report of the commissioners to the clerk of the court to which any appeal under this act may have been taken, the said company shall be entitled to the said lands in fee, and if such valuation be not received when tendered it may at any time thereafter be received or may be collected from said company, without
106 interest, by action at law, at the cost and expense of the person or persons entitled to the same: Provided, Such valuation shall not have been paid to the clerk of the court in which such appeal may have been taken; and, Provided, That the cost of any proceedings and judgments specified in this act shall be taxed by the court and paid by the said company, except in cases where, upon appeal, the verdict of the jury shall be for the same or a less sum than that reported by the said commissioners.

SECTION 3. The said company and, under their direction, their agents, servants, and workmen, are hereby authorized and empowered to enter into and upon the lands and grounds of and belonging to the State or to any person or persons, bodies politic or corporate, and survey and take levels of the same or any part thereof and to lot out and ascertain such parts as they may deem necessary and proper for making said railroad, with one or more tracks, and for all the purposes connected with said railroad to take and appropriate any lands, to fell and cut down all timber and other trees standing or being within seventy-five feet on each side of said railroad, the damages occasioned by the felling of said trees, unless otherwise settled, to be paid in the manner hereinbefore provided for damages for lands taken for the use of said railroad company, and also to make, build, erect, and set up in and upon the route of said railroad or upon the land adjoining the same all such works, ways, roads, and conveyances as may be required for the purposes of said railroad; also from time to time to alter, repair, widen, amend, or enlarge the same as deemed necessary by said company, the said company doing as little damage as possible in the exercise of said powers hereby granted and making satisfaction in the manner hereinbefore mentioned for all damages to be sustained by the owners or occupiers of the said lands.

SECTION 4. The said corporation are hereby further au-
107 thorized to receive any subscriptions, donations, or gifts to the capital stock of said company, either in money, lands, labor, material, cars, locomotives, or other articles, personal or real, adapted to the construction or operation of said railroad, or any property that in the opinion of the board of directors may be exchanged or converted to such use, and upon receiving full payment in manner aforesaid of any such subscription of stock may issue to such subscribers certificates of stock therefor.

SECTION 5. The several counties in which any part of said railroad has or may hereafter be located, or that may lie on or near the line of said road, and the several townships in said counties which have adopted or may hereafter adopt township organization, and the cities and incorporate towns in said counties are hereby authorized to subscribe and take stock in said company.

SECTION 6. Elections may be held in any such county, township, city, or incorporate town upon the question whether such county, township, city, or town shall subscribe for any specified amount of stock of said company, not exceeding one hundred thousand dollars, and elections shall be held in any such county, township, city, or town as often as a petition shall be presented, as hereinafter specified, until such county, township, city, or town shall have subscribed for the full amount of stock authorized by this act.

SECTION 7. Whenever a petition shall be presented to the county clerk, signed by fifty legal voters of any such county, setting forth the amount of stock proposed to be taken by any such county and specifying the time for holding such an election, it shall be the duty of the county clerk of such county to give ten days' notice of the time of holding such election, which shall be the same time as that specified in such petition; and whenever a petition shall be presented to the supervisor of any such township, or to the corporate authorities of any such city or town, signed by twenty-five legal voters of any such township, city, or town, setting forth the amount of stock proposed to be taken by any such township, city, or town, and specifying the time for holding such election, it shall be the duty of the supervisor of every such township, and the duty of the clerk of every such city or town to give ten days' notice of the time of holding such election in such township, city, or town, which shall be the same time as that specified in such petition, which said notice or notices shall be given in the same manner, and such election or elections shall be conducted in the same mode and at the places provided for holding general elections in such counties, townships, cities, and towns, at which election or elections the qualified voters of the respective counties, townships, cities, and towns shall vote "for subscription" or "against subscription," and the returns of such election or elections shall be made to the county clerk in the same manner and within the same time, and shall be by him opened and declared in the same manner as for elections held for State and county officers; and if a majority of the votes cast at such election by voters voting on that subject shall be "for subscription," it shall be the duty of the county court or board of supervisors of every such county, the supervisor and clerk of such township, and the corporate authorities of such city or town to subscribe, without unnecessary delay, upon the request of said company, for stock in said company to the amount so voted for, and to issue and deliver to said company the same amount as the stock so subscribed of the bonds of such county, township, city, or town, as the case may be, payable at any time specified, not exceeding fifteen years from date or sooner, at the option of the county, township, city, or town issuing the same, with interest, by coupons attached for the same, at a rate not exceeding ten per cent. per annum, payable annually, which said bonds and interest accruing thereon shall be made payable at such place within the United States as said company may request: Provided, That at any election held under the provisions of this act at any other time than the time for holding general elections for State or county

purposes it shall not be necessary for the several boards of registry to make a new register of the several voting precincts, but the register made of the legal voters at the last general election held for the election of State or county officers may be used: Provided, That any legal voter whose name does not appear on said register shall be received and taken in the same manner that unregistered legal voters' votes are received at any general election.

SECTION 8. It shall be the duty of the respective authorities of the several counties, townships, cities, and towns which may vote such subscription, and they are hereby required, to levy and collect a sufficient special tax on all the taxable property, both real and personal, in such counties, townships, cities, and towns to pay the interest annually accruing on such bonds and to liquidate the principal of such bonds within the time specified in the same for their payment; and this provision shall apply as well to any vote taken by any county, township, city, or town on the line of said railroad for taking stock in the same previous to the passage of this act as for stock taken under the provisions of this act. Said tax shall be levied on the assessments made by the assessors of their respective counties, townships, cities, and towns, as provided by the revenue laws of this State for assessing property, and shall be extended on the collectors' books of such county, township, city, or town as a special railroad tax and collected by the respective collectors of such counties, townships, cities, and towns at the same time and in the same manner as provided by law for collecting State and county tax, which said tax shall be paid by the respective collectors to the county treasurer of the county in which the tax is collected, deducting therefrom one per cent. only for collecting; and the said county treasurers shall be respectively liable on their bonds for the faithful application of said tax to the payment of the interest and principal of the bonds for which said tax was levied and collected to pay, and shall receieve therefor, in full compensation, a commission of one per cent. only for receiving and paying out said tax. The corporate authorities of the respective counties and townships shall certify to the county clerk of the proper county the rate per cent. to be levied for such year for such special tax, and the said county clerk shall extend on the collectors' books for such county or township as a special railroad tax at the rate so certified for each year in the same manner and on all the property on which State and county tax is extended, and shall receive the same pay therefor as for like service for State and county purposes; and the respective authorities of such cities and towns shall levy and collect such special railroad tax in the same manner as other tax is levied and collected in and for such cities and towns: Provided, That in case the said authorities for any such county, township, city, or incorporated town shall fail to certify to such clerk the rate per cent. to be levied for any year before the time required by law for said clerk to extend State and county tax, or shall certify to a less amount than will pay the same, then the said county clerk shall extend such tax as will pay the interest and principal due for such year on all such bonds so issued by the respective counties, townships, cities, and incorporated towns.

SECTION 9. Whenever it shall be necessary for the construction of said railroad to intersect or cross the track of any other railroad, or to cross any stream of water or water-course or road or highways lying on the route of said road, it shall be lawful for the company to construct their railroad across, upon, or by the side of the same:

Provided, That the said company shall restore the railroad,
111 stream of water, water-course, road, or highway thus intersected, traversed, or crossed to its former state, or in a sufficient manner not to materially impair the same in its usefulness: Provided, That whenever it shall become necessary for said railroad company to cross the track of any other railroad company now built or which may be hereafter constructed, the expense of putting in and building such crossing shall be paid and shared equally by and between the two companies so connecting or intersecting each other.

SECTION 10. It shall be lawful for the incorporate authorities of any incorporate city or town through which said railroad shall be located to donate or lease to said railroad company as a right of way the right to lay a single or double track through said city or incorporate town or any portion of the same on any street or highway that the said railroad company shall select for that purpose, said lease or permit to be unchangeable and perpetual, except at the option of said railroad company.

SECTION 11. Said company shall have power to contract for the building of said railroad or any portion thereof by their president, with the consent and approval of the board of directors or a majority of them, and power to purchase, contract for, and place on the said railroad heretofore and hereby authorized to be constructed all machines, machinery, rolling stock, and other property which they may deem necessary and proper for building or operating said railroad, and power to transport or carry upon said railroad by force and power of steam, animals, or any combination of them, and may fix, establish, take, and receive such rates of toll for all passengers and property conveyed or transported upon the same as the directors shall from time to time establish, and shall carry and transport the mails of the United States on such terms as may be agreed upon.

SECTION 12. The stock of said company shall be deemed
112 personal property, and may be issued, certified, transferred, and registered in such manner and at such places as may be ordered and provided by the board of directors, who shall have power to require the payment of stock subscribed in the manner and at the time and in such sums as they may direct, and on the refusal or neglect on the part of the stockholders or any of them to make payment on the requisition of the board of directors the shares of stock delinquent or so unpaid may, at the option of the said board of directors, after thirty days' public notice, be sold at public auction under such rules as the directors may adopt, the surplus money, if any, remaining after deducting the payment due, with interest and cost of sale, to be paid to the delinquent stockholder.

SECTION 13. Said company shall have power to consolidate and connect its railroad with any other continuous line of railroad now

constructed or which may be hereafter constructed, either in this State or in the State of Indiana, upon such terms as may be agreed upon between the companies so connecting or uniting, and for that purpose full power is hereby given to said company to make and execute such contracts with any other company as will secure the object of said consolidation or connection.

SECTION 14. Said railroad company are hereby authorized to borrow money, from time to time, on credit of said company, at any rate of interest not exceeding ten per cent. per annum, as may be agreed upon between the parties, for the sole purpose of constructing said road and furnishing the same with cars, locomotives, and other machinery necessary to carry on the operation of said company, and may issue its corporate bonds therefor in denominations of not less than five hundred dollars, with coupons attached for the interest, and to secure the payment thereof, with the interest that may accrue thereon, may mortgage their corporate property or franchises, or both, or may convey the same by deed of trust for said pur-
113 poses; and they may, by their president or other officers or agents, sell, dispose of, or negotiate such bonds or the stock of said company at such times and places, either within or without this State, and at such rates and for such prices as, in their opinion, will best advance the interests of said company, and if such bonds or stocks are sold at a discount such sale shall be as valid and binding in every respect as if sold at par value: Provided, That the total amount of first-mortgage bonds of said company shall not exceed in amount the sum of twelve thousand dollars per mile of the said railroad constructed or to be constructed.

SECTION 15. The directors of said company may confer on any bondholder of any bonds issued for money borrowed as aforesaid the right to convert the principal due or owing thereon into the capital stock of said company at any time not exceeding ten years from the date of the bond, under such regulations as the directors of said company may see fit to adopt.

SECTION 16. The said company shall annually or semi-annually make such dividends as they may deem proper of the net profits, receipts, or income of said company among the stockholders in proportion to their respective shares.

SECTION 17. All the corporate powers of said company shall be vested in and exercised by the board of directors, a majority of whom shall constitute a legal quorum for the transaction of all business, and they shall have power to appoint such other officers, agents, or servants as they may deem necessary. Vacancies in the board may be filled by a majority of those remaining, such appointees to continue in office until the successors of the then board shall be qualified. The annual election of directors shall be held on the second Tuesday in January in each year, at such place as the directors may direct, twenty days' notice being given by publication in one or more newspapers at or near the line of said road: Provided, That
114 the present board of directors and officers, consisting of John Schofield, Samuel Q. Quinn, J. F. Alexander, Frederick Remann, William S. Smith, William S. Wait, Henry Weinheimer,

Joshua S. Peers and J. P. M. Howard, directors; J. P. M. Howard, president; Williamson Plant, secretary, and William S. Smith, treasurer, whose election, qualifications, and acts, as well as those of the preceding board, are hereby legalized, shall hold their respective offices until their successors are chosen and qualified; and said board of directors shall have power to change its president, secretary, or treasurer at pleasure, at any regular or special meeting of the board: Provided, A majority of the nine directors vote for such change.

SECTION 18. At any election held for choosing directors or for other purposes each share of stock shall be entitled to one vote, to be given either in person or by proxy; each person shall be voted for directly, and those receiving the highest number of votes shall be declared duly elected, and shall hold their offices until the next annual election and until their successors are elected and qualified; all elections of directors to be conducted by three judges to be selected by the stockholders present, and at all such elections and on all questions voted upon by the stockholders of said company all stock subscribed for and owned by any county, township, city, or incorporated town, in the manner hereinbefore provided, may be represented and voted by such person or persons or his or their proxy, as the proper authorities of the respective counties, townships, cities, and incorporate towns shall designate or appoint.

SECTION 19. The board of directors shall have power to control and regulate the manner of transportation of persons and property, the width of track, the construction of wheels, the form and size of cars and locomotives, the weight of loads, and all other matters and things respecting the use of said road and the conveyance of persons and property thereon, and shall have power to make, ordain, establish, and execute all such by-laws, rules, and regulations as they may deem expedient and necessary to fulfill the purposes and carry into effect the provisions of this act and for the well ordering and securing the affairs, business, and interests of said company: Provided, That the same be not repugnant to the Constitution and laws of the United States or of this State.

SECTION 20. The certificate of the secretary of said company, under the corporate seal thereof, shall be received in all courts of justice and elsewhere as evidence of the regular organization of said company under its charter and of any acts or order of the board of directors of said company.

SECTION 21. The corporate rights, privileges, and franchises of said company as granted are hereby declared to be in full force and effect and shall be liberally construed for all the purposes sought to be obtained.

SECTION 22. This act to take effect from and after its passage.

Approved February 8, 1867.

EXHIBIT "C" to Bill.

ST. LOUIS & VANDALIA R. R. CO.

vs.

TERRE HAUTE & INDIANAPOLIS RAILROAD CO.

An act to incorporate the Terre Haute and Richmond Railroad Company, approved January 26, 1847.

SECTION 1. Be it enacted by the General Assembly of the State of Indiana, That Chauncey Rose, Samuel Crawford, E. M. Huntington, James H. Turner, W. W. Reynolds, J. M. Mullikin, James Farrington, Thomas J. Bourne, and R. W. Thompson, of the county of Vigo and State of Indiana, and their successors in office, duly
116 elected as hereinafter provided, are hereby constituted a body corporate and politic by the name of "the president and directors of the Terre Haute and Richmond Railroad Company," and by such name shall be capable to sue and be sued, plead and be impleaded, answer and be answered unto, either in law or equity, in any court of competent jurisdiction within this State; and shall have power to make and use a common seal, and the same to alter at pleasure, and to make contracts and enforce the same, and to establish and put in force such by-laws, rules, and regulations as may be necessary to carry into effect the provisions of this act not inconsistent with the Constitution and laws of this State and of the United States.

SEC. 2. The capital stock of said company shall be eight hundred thousand dollars, to be divided into shares of fifty dollars each.

SEC. 3. The directors named in this act, or a majority of them, may meet at such time and place as they may agree upon and organize said corporation by the election of one of their body as president, and after such organization any members of said board shall constitute a quorum for the transaction of business.

SEC. 4. The corporation shall have power to appoint agents, clerks, treasurers, surveyors, engineers, superintendents, artists, and all other officers and persons necessary to carry into effect the objects of this act. They shall keep a journal of their proceedings, in which shall be entered all (the) by-laws, rules, and regulations, and all orders for the payment of such allowances as may be made to their officers and all others in their employ, which journal shall from time to time be read by the board, and if found to be correct, signed by the president. They may sit on their own adjournments or on the call of the president. When the president is absent
117 they may appoint a president *pro tempore*. They shall fill all vacancies that may happen in their own body.

SEC. 5. The corporation shall cause books to be opened for subscription to the capital stock at such time and at such place or places as they may choose, due notice of which shall be given in at least one newspaper published in the town or city where said books are proposed to be opened.

SEC. 6. It shall be lawful for all persons of lawful age, for the

agent of any corporate body, for the agent of State or of the United States, on behalf of the same, to subscribe for any amount of capital stock, and the books shall be kept open for any such space of time and at such place or places as the corporation shall choose, and may be reopened at any time, and they may, by an agent, offer for sale in any other State any amount of stock upon such terms and conditions as may be thought advisable. They shall have power, on the credit of the corporation, to borrow money on such terms as may be agreed upon by the parties. The corporation may require such sum of money to be paid at the time of subscribing, not exceeding ten dollars on each share, as they may think proper, but such requisition shall be made known by being inserted in the notice for opening the books, and any future payments on the stock shall be under the control of the corporation.

SEC. 7. As soon as fifty thousand dollars are subscribed for and ten dollars are paid on each share it shall be the duty of the corporation to give three weeks' notice thereof in one or more newspapers, and in such notice to appoint a time and place for the stockholders to meet and elect thirteen directors, who shall be stockholders, and said election shall be conducted by two judges appointed by the stockholders present, and the persons having a plurality of
118 votes given and counted in public shall be declared duly elected. No share shall confer a right to vote at any election unless the same shall have been held one month previous to the election. In all elections one share shall entitle the holder to one vote, and votes may be given by the person owning the same or by one of any partners or by the husband, father, mother, administrator or executor, trustee or guardian, or by the authorized agent of any corporation, State, or of the United States, or any person having a right to vote may vote by written proxy.

SEC. 8. It shall be the duty of the directors elected as above and those elected at all subsequent elections to meet as soon thereafter as they conveniently can and elect one of their own body president. The president and directors thus elected shall continue in office until the next annual election and until their successors are elected and qualified or organized.

SEC. 9. All elections after the first shall be held on the first Monday in January annually, under the direction of three stockholders not directors at the time, to be appointed by the board at a previous meeting or by the stockholders present at the time of holding said election, and notice of said election shall be given in at least one newspaper: Provided, That if, from any cause whatever, there should be no election held on the day appointed by this act or by the directors for the first election, it shall be lawful to hold the election on any other day.

SEC. 10. Certificates of stock shall be given to the stockholders, which shall be evidence of the stock held. They shall be signed by the president and countersigned by the clerk. The stock shall be transferred on the books of the corporation personally or by agent or attorney, or by the administrator, executor, trustee, or guardian,

but such stock shall be held at all times by the corporation
119 for any dues from the holder thereof to the corporation, or for any sum that may thereafter become due on contract made prior to such transfer.

SEC. 11. The corporation shall have power to call for such portions of the stock subscribed, not exceeding twenty-five dollars on each share in any one year, as they may think proper, to be paid at such time and place as they may designate, by giving sixty days' notice in some newspaper of general circulation where said stock is made payable, or by written notice given to the stockholders, in which shall be specified the amount demanded on each share and the time and place of payment. If any stockholder shall neglect or refuse to pay any such requisition within ten days after the time named for such payment the corporation may bring suit against such delinquent for the amount due and called for, in any court of competent jurisdiction, and recover the amount due, with ten per centum damages for such detention; and if the amount cannot be made on execution, or if such delinquent is out of the State, then the corporation may, by an order on their books, declare such stock forfeited to the corporation, with whatsoever amount may have been paid thereon, and no such delinquent, before the forfeiture of the stock, shall have any right to vote for directors or recover any dividend on his, her, or their stock until the corporation is fully satisfied.

SEC. 12. The corporation, by their agents, shall have full power from time to time to examine, survey, locate, and construct a railroad, of a single or double tract, commencing at some point on the western line of the State of Indiana and running, on the best ground for the interest of the company and the public convenience, eastwardly through Terre Haute, in the county of Vigo; Greencastle, in the county of Putnam, and Indianapolis, in the county of Marion, to Richmond, in the county of Wayne.

120 SEC. 13. And for the purpose of making such examination and location it shall be lawful for the corporation, by their agents and persons in their employ, to enter upon any land, to make surveys and estimates, and for the purpose of searching for stone, gravel, wood, or other materials necessary for the construction of said road; but no stone, gravel, wood, or other material necessary for the construction of said road shall be taken away from any land without the consent of the owner thereof until the rate of compensation shall be ascertained and paid.

SEC. 14. It shall be lawful for the corporation, either before or after the location of any section of the road, to obtain from the person or persons through whose land the same may pass a relinquishment of so much of the land as may be necessary for the construction or location of said road, as also the stone, gravel, timber, and other materials; and it shall be lawful for said corporation to receive, by donations, gifts, grants, or bequests, land, money, labor, property, stone, gravel, or other materials for the benefit of said corporation; and all such contracts, relinquishments, donations, gifts, grants, and bequests made and entered into in writing by any person or persons capable in law to contract, made in consideration of such location,

for the benefit of the corporation, shall be binding and obligatory, and the corporation may have their action at law in any court of competent jurisdiction to compel the same: Provided, That all such contracts, relinquishments, donations, gifts, grants, and bequests shall be fully and plainly made in writing, signed by the party making the same.

SEC. 15. That in all cases where any person through whose land the road may run shall refuse to relinquish the same, or where a contract between the parties cannot be made, it shall be lawful for the corporation to give notice to some justice of the peace in the county where the difficulties may occur that such facts do exist, and such justice of the peace shall thereupon summon the owner
121 of such land to appear before him on a particular day, within ten days thereafter, and shall appoint twelve disinterested persons of the neighborhood, who shall, after taking an oath faithfully and impartially to assess the damages, if any, view the land and materials; and, after having taken into consideration the advantages as well as the disadvantages the road may be to the same, *and* shall report thereon whether such person is entitled to damage or not, and, if so, how much, and shall file such return with such justice; whereupon said justice shall enter judgment thereon, unless for good cause there shown; and in case either party should show sufficient cause why judgment should not be entered the justice may grant a review of the premises, either with or without costs: Provided, That either party may at any stage of the proceedings appeal to the circuit court of the proper county as in other cases, and such court shall appoint reviewers as above directed, who may report at that or succeeding terms, in the discretion of the court, and the judgment of the circuit court shall be final.

SEC. 16. And in all cases where the owner or owners of such land or materials shall be minors, insane persons, or reside out of the county where such lands may be, such justice shall cause three notices of the application made and of the day fixed for the appointment of viewers to be posted up in three of the most public places in the county; and if no person shall attend on the day named in said notice said justice shall adjourn the same until that day two weeks, at which time he shall proceed as if such person or persons had been duly notified to attend; and on such judgment being rendered and the corporation complying therewith by the payment of costs or damages awarded against them, the corporation shall be seized of the land or materials. Cost shall be allowed or awarded against either party at the discretion of the justice.

122 SEC. 17. That if it should be found necessary and advantageous to the location and construction of said road the corporation shall have the right to lay the same along and upon any State or county road: Provided, however, That before such location shall be made the corporation shall make application to the county commissioners of the proper county for such right, and the said county commissioners are hereby vested with power to grant the same by an order entered on their records; And provided, also, That such right shall be granted on condition that the corporation shall

leave a sufficiency of said State or county road in as good repair, for common use, as previous to such occupation.

SEC. 18. That when such corporation shall have procured a right of way, as hereinbefore provided, they shall be seized in fee simple of the right to said land, and shall have the sole use and occupation of the same, and no person, body corporate or politic, shall in any way interfere therewith, molest, disturb, or injure any of the rights and privileges hereby granted or that would be calculated to detract from or affect the profits of said corporation.

SEC. 19. The corporation shall commence the construction of said road at any time within five years after the opening of the books, and from time to time construct so much towards the point of destination as may be within the ability and to the interest of the company, and shall complete it within fifteen years from its commencement: Provided, That if the road should not be completed within the time aforesaid the General Assembly may, for good cause shown, give further time for its construction: Provided, also, If any part of said road shall be completed within the time aforesaid, in that case all the rights, privileges, and benefits granted in this act shall be extended to and vested in said company to such part of said road as shall be completed.

123 SEC. 20. It shall be the duty of said corporation whenever any State or county road now established shall cross or may hereafter cross the railroad; to make and keep in repair good and sufficient causeways, so that the free use of said State and county road shall not be obstructed; and in all cases where any person shall own land on both sides of said road, and there shall not be any causeway for a public road leading from one tract to the other, the owner of such lands shall have the right, free of charge, to cross the same and to make such causeways as may be necessary for the convenience of said owner: Provided, That such owner of land shall not injure or obstruct said road.

SEC. 21. That it shall be lawful for said corporation to place or prescribe the kind of carriages that may be used on said road, whether propelled by steam or other power, for the transportation of passengers, for all kinds of products, lumber, goods, wares, and merchandise, or any other kind of property, and for this purpose the corporation may construct said road with such turns, gates, bridges, aqueducts, culverts, toll, and warehouses as may be considered necessary for the interests of the company and convenience of the public; and the corporation may charge tolls and freights on such part of the road as may be in a sufficient state for travel, although the whole be not finished; and they may charge for travel and transportation on the same when it is graded and bridged, although the rails may not be laid so as to admit carriages thereon.

SEC. 22. The corporation may charge and receive such tolls and freights for the transportation of persons, commodities, and carriages on said road or any part thereof as shall be for the interest of said company, and to charge, lower or raise at pleasure: Provided, That the rates established from time to time be posted in some conspicuous place or places on said road.

124 SEC. 23. That when the aggregate amount of dividends declared shall amount to the full sum invested and ten per centum per annum thereon the Legislature may so regulate the tolls and freights that not more than fifteen per centum per annum shall be divided on the capital employed, and the surplus profits, if any, after paying the expenses and receiving such proportion as may be necessary for future contingencies, shall be paid over to the treasurer of state for the use of common schools, but the corporation shall not be compelled by law to reduce the tolls and freights so that a dividend of fifteen per centum per annum cannot be made; and it shall be the duty of the corporation to furnish the Legislature, if required, with a correct statement of the amount of expenditures and the amount of profits, after deducting all expenses, which statement shall be made under the oath of the officer whose duty it shall be to make the same.

SEC. 24. Semi-annual dividends of so much of the profits as the corporation may deem expedient shall be made on the first Monday in December and July annually, unless the directors fix on a different day, and pay the stockholders as soon thereafter as they can with convenience, and no dividends shall be made to a greater amount than the net profits after deducting all the expenses; and the directors may retain such proportion of the profits as a contingent fund to meet subsequent expenses as they shall deem proper.

SEC. 25. That if any person or persons shall knowingly and willfully injure or obstruct said road or any part thereof, or shall break, destroy, or deface any work, edifice, device, toll, or warehouse belonging thereto, such person or persons so offending shall pay to the corporation five times the amount of damage actually done, with costs of suits, to be recovered by the corporation before any court having competent jurisdiction: Provided, That all actions commenced by the corporation for the recovery of damages shall be commenced within six months from the time such cause of action occurred and not after.

125 SEC. 26. It shall be lawful for the county commissioners for the county through which the road passes, for and on behalf of such county, to authorize by an order as much of the stock to be taken as they may think proper at any time within five years from the opening of the books.

SEC. 27. It shall be the duty of the corporation to cause a full statement of the affairs of the company to be made and exhibited to the stockholders at any annual election or at any other general meeting of the stockholders.

SEC. 28. Any number of the stockholders owning one-third of the stock may call a general meeting of the stockholders by giving four weeks' notice thereof, in which specifying the object of the call, and, a majority of the stockholders being represented, they may make such order relative to the concerns of the company as a majority may determine.

SEC. 29. The corporation may, by contract, admit the intersection with said road with any other railroad, turnpike, or any other road or collateral road.

SEC. 30. The State in time of war shall have the right to transport troops, munitions of war, and provisions free of toll on said road.

SEC. 31. Should the capital herein granted not be sufficient to accomplish the intended work, the corporation may increase the same, and the stockholders may, at any general meeting, reduce the number of directors to any number not less than five.

SEC. 32. That when the road is located it shall be the duty of the corporation to cause a plat of the same to be deposited in the office of the secretary of state, and from and after that time it shall not be lawful for the said corporation to alter or change any part of the said location unless said corporation pay the owner or owners
126 of lands on such changed route the amount of damages they may sustain by such relocation.

SEC. 33. That if said road, after its completion, shall be suffered to go into decay, or be impassable for one year, unless when the same is repairing, this charter shall be taken and considered as forfeited.

SEC. 34. The corporation shall in no case, directly or indirectly, engage in any kind of trade or deal in merchandise other than such as may be necessary to carry into effect the objects contemplated by this act, nor shall said corporation, under any pretense whatever, enter into a banking business for the purpose of receiving deposits, making discounts, or issuing bills of credit or receipts of any description to pass as circulating medium.

SEC. 35. The corporation shall cause to be kept a fair record of the whole expense of making and repairing said railroad, and of each section thereof, with all the incidental expenses, and also a fair account of the tolls received; and the State shall have the right to purchase the stock of said company at any time after twenty-five years by paying to said corporation a sum of money, which, together with the tolls received, shall equal the cost and expenses of said railroad as aforesaid, with an interest of ten per centum per annum, and the books of said company shall always be open for the inspection of any agent of the State appointed for that purpose by the Legislature, and upon any refusal to exhibit their books and accounts to said agents, upon request made to the president, all powers granted by this act shall cease.

SEC. 36. The directors of said company that shall contract any debts over and above the amount of good and solvent stock subscribed shall be individually liable for the payment of such excess, and the Legislature reserves the right to alter or amend this
127 charter at any time, and to repeal the same whenever its provisions have been violated by said company.

SEC. 37. This act shall take effect and be in force from and after its passage, and shall be deemed and taken to be a public act.

EXHIBIT "D" to Bill.

ST. LOUIS, VANDALIA & TERRE HAUTE RAILROAD CO.

vs.

TERRE HAUTE & INDIANAPOLIS RAILROAD CO.

An act to change the name of the Terre Haute and Richmond Railroad Company and to give further time for the completion of the line of said road from Terre Haute to a point on the western line of the State of Indiana. (Approved March 6, 1865.)

SECTION 1. Be it enacted by the General Assembly of the State of Indiana, As the "act" approved January 26, 1847, entitled "An 'act' to incorporate the Terre Haute and Richmond Railroad Company," incorporating said company under the name of the president and directors of the Terre Haute and Richmond Railroad Company, that the said name and style of said company be, and the same is hereby, changed, and said company shall hereafter be known by the name and style of the Terre Haute and Indianapolis Railroad Company." All contracts, obligations of any kind whatever, and liabilities of every kind heretofore entered into or contracts in any manner under the name of the Terre Haute and Richmond Railroad Company or under the name of the president and directors of the Terre Haute and Richmond Railroad Company by said company shall remain in full force, notwithstanding the change in the corporate name herein provided for, so that the said company, under the new name of the Terre Haute and Indianapolis Railroad
128 Company, shall have and possess all the rights and be subject to all the liabilities imposed by said act entitled An act to incorporate the Terre Haute and Richmond Railroad Company, approved January 26, 1847, and by virtue of the provisions of each and every act subsequently enacted amendatory of or in aid of said "act" incorporating said company as fully as such rights, privileges, franchises, and liabilities would have existed had the name and style of said company not been changed by this act.

SEC. 2. That—as it is provided in section 19 of said act, in the following words: The corporation shall commence the continuation of said road any time within five years after the opening of the books and from time to time construct so much towards the point of destination as may be within the ability and to the interest of the company and shall complete it within fifteen years from its commencement: Provided, That if the road should not be completed within the time aforesaid, the General Assembly may, for good cause shown, give further time for its construction: Provided also, If any part of said road shall be completed within the time aforesaid, in that case all the rights, privileges, and benefits granted in this act shall be extended to and vested in said company to such part of said road as shall be completed—*that* as said company completed so much of said road as lies between Terre Haute and Indianapolis within the time authorized by the act incorporating said company, and as so much of the route or line as lies between Indianapolis and Rich-

mond was separated from the said Terre Haute and Richmond Railroad Company and the same was completed by the Indiana Central Railway Company under an act of the General Assembly of the State of Indiana authorizing the same, and as said company have not completed so much of said line as lies between Terre Haute and a point on the western line of the State of Indiana within the
129 time prescribed, as neither public or private interests required its construction at the time the other portion was, that said company, under the name and style of the Terre Haute and Indianapolis Railroad Company, shall have seven years further time to complete their railroad to a point on the western line of the State of Indiana from Terre Haute.

EXHIBIT "E."

Mortgage.

St. Louis, Vandalia and Terre Haute Railroad Company to Joseph T. Thomas, trustee. $1,900,000. Dated January 1, 1867. Bonds mature January 1, 1897. Interest at the rate of seven per centum, payable July and January.

ST. LOUIS, VANDALIA & TERRE HAUTE RAILROAD CO.

versus.

TERRE HAUTE & INDIANAPOLIS RAILROAD CO.

This indenture, made this first day of January, in the year of our Lord one thousand eight hundred and sixty-seven, by and between the St. Louis, Vandalia and Terre Haute Railroad Company, of the first part, and Joseph T. Thomas, of the second part, —:

Whereas the said parties of the first part are a corporation duly formed and organized in pursuance of a statute of the State
130 of Illinois entitled "An act to incorporate the St. Louis, Vandalia and Terre Haute Railroad Company," approved February tenth (10th), eighteen hundred and sixty-five, and in pursuance of a statute of the State of Illinois entitled "An act to amend an act entitled 'An act to incorporate the St. Louis, Vandalia and Terre Haute Railroad Company,'" approved February eighth (8th), eighteen hundred and sixty-seven;

And whereas, for the purpose of raising means necessary for the construction of the said St. Louis, Vandalia and Terre Haute railroad and completing and equipping the same, the said parties of the first part have resolved to make, execute, and deliver bonds in the form and amounts hereinafter specified, secured by trust deed or mortgage, the said bonds to — designated as sinking-fund bonds and to amount to one million and nine hundred thousand dollars ($1,900,000);

And whereas the said St. Louis, Vandalia and Terre Haute Railroad Company, at a regular meeting of their board of directors held at Greenville, Bond county, State of Illinois, on the twelfth day of February, eighteen hundred and sixty-seven, authorized their presi-

dent to execute, make, and deliver said bonds to the amount herein specified and in the form hereinafter described, to wit, the said bonds to amount in the aggregate, as before stated, to one million nine hundred thousand dollars; to be issued in sums of not less than five hundred dollars each and numbered consecutively; to be dated the first day of January, one thousand eight hundred and sixty-seven, and payable thirty years after date, in the city of New York or in the city of London, England, bearing interest at the rate of seven (7) per centum per annum, payable semi-annually, at the city of New York or at the city of London, on the first days of January and July in each year, to be equably and ratably secured by a first mortgage, and to be entitled to the advantages of a special
131 lien hereinafter established in their favor and the benefits of the sinking fund hereinafter provided; and to secure payment of said bonds according to their tenor and effect the said St. Louis, Vandalia and Terre Haute Railroad Company did, at their aforesaid regular meeting, authorize and direct the president and treasurer thereof to make and execute said mortgage or deed of trust, and said bonds for the purposes herein stated, the said mortgage to be the first lien upon all franchises, estate, leases, and property of said company now held or hereafter to be acquired, and the said bonds to be in the form or in substance following, to wit:

No. —.

UNITED STATES OF AMERICA, *State of Illinois.*

$——. $——.

St. Louis, Vandalia and Terre Haute Railroad Company.

First-Mortgage Sinking-Fund Bond.

Know all men by these presents that the St. Louis, Vandalia and Terre Haute Railroad Company are indebted to J. Edgar Thomson or bearer in the sum of —— dollars, lawful money of the United States of America, which the said company promise to pay to the bearer hereof on the first day of January, A. D. one thousand eight hundred and ninety-seven, at the city of New York, with interest thereon at the rate of seven per centum per annum, payable semi-annually, at the city of New York, on the first days of January and July in each year, on the presentation and surrender of the annexed coupons as they severally become due; and in case of non-
132 payment of interest for any half year, if demanded and the same remain in arrear for six months thereafter, the principal shall become due and payable as provided in the trust deed hereinafter mentioned.

This bond is one of an issue of not exceeding $1,900,000 bonds of the same tenor and date, the payment of which is secured by a mortgage and first lien on the railroad, property, equipments, and franchises of said company, duly executed and delivered to Joseph T. Thomas, of Philadelphia, Pa., as trustee, bearing even date herewith and duly recorded.

And the holder hereof is entitled to the priorities established in favor of the said first-mortgage bonds and to the benefits of a sinking fund of $20,000, to be set apart annually by the said company as specified in said deed of trust. This bond shall not become obligatory until it shall have been authenticated by a certificate annexed to it duly signed by the said trustee. This bond may be transferable by delivery or it may be registered on the books of the company, at the option of any holder, and, after such registry and the endorsement of the certificate thereof upon the bond, no transfer shall be valid unless such transfer shall be registered on the books of said company or until it has been released from such registry on said books.

In witness whereof the said company have caused their corporate seal to be hereto affixed and their president and treasurer to sign and their secretary to countersign the same, and have caused the coupons hereto annexed to be signed by their secretary this first day of January, in the year of our Lord one thousand eight hundred and sixty seven.

—— ——, *President.*
—— ——; *Treasurer.*

Countersigned by—
—— ——, *Secretary.*

133 Now this indenture witnesseth: That the parties of the first part, in consideration of the premises and of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, and in order to secure the payment of the principal and interest of the bonds aforesaid, issued or to be issued, as herein recited and provided, and every part of the same as it shall become payable, according to the tenor of said bonds, have granted, bargained, sold, conveyed, and transferred, and do by these presents grant, bargain, sell, convey, and transfer, unto the party of the second part and unto his successors and assigns all the railroad of the parties of the first part, constructed or to be constructed, from East St. Louis, in the State of Illinois, by way of Greenville and Vandalia or by any other route, as the same shall be hereafter finished, a distance of about one hundred and fifty-five (155) miles, as fully and effectually as if the whole of said railroad were completed before the execution of these presents, including all the railways, ways and rights of way, depot grounds and other lands, and all tracks, bridges, viaducts, culverts, and other structures; all depots, station-houses, engine-houses, car-houses, freight-houses, wood-houses, and other buildings, and all machine shops and other shops, whether now held or hereafter acquired for use in connection with the said railroad or the business thereof; and including, also, all locomotives, tenders, cars, and other rolling stock or equipments, and all machinery, tools, implements, fuel, and materials for constructing, operating, repairing, or replacing the said railroad or any part thereof or any of its equipments or appurtenances, whether now held or hereafter acquired, and all franchises of the said company now held or hereafter acquired by the said parties of the first part, together with all and singular the tene-

ments, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversions, remainders, tolls,
134 incomes, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, claim, and demand whatsoever, as well in law as in equity, of the said parties of the first part of, in, and to the same and every part thereof, with the appurtenances, reserving, nevertheless, to the said parties of the first part full power to sell or exchange any lands which may be held for use of any of the aforesaid depots, shops, or other buildings, or for a supply of timber, fuel, or gravel or other material, or any lands situated at a distance of one-fourth of one mile or more from said line of railroad, but the lands acquired in substitution for any so sold or exchanged shall become subject to the operation of these presents with the same effects as if originally embraced herein by specific description, and reserving also to the said parties of the first part full power from time to time to dispose of, according to their discretion, such portions of the said equipment, machinery, and implements as may have become unfit or unnecessary for the use of the said parties of the first part, and to replace the same by new, which shall thereupon become subject to the operation of these presents as aforesaid; to have and to hold the above-described premises and appurtenances, but subject to the reservations, conditions, and provisions herein contained, unto the said party of the second part and his successors and assigns in the trust hereby created, to the only proper use and behoof of the said party of the second part, his successors and assigns, in trust, nevertheless, for the following purposes, to wit: In case default shall be made by the parties of the first part or their successors or assigns in the payment of any interest on the aforesaid bonds, according to the tenor of the coupons thereto annexed, or in the payment of any principal of any such bonds, as the same shall become payable, to be made, or in any covenant or agreement of the said parties of the first part herein required to be performed or kept by the
135 said parties; and, if such default shall continue for the period of six months thereafter, it shall be lawful for the said trustee himself or by his attorneys or agents to enter into and upon all and singular the premises hereby conveyed, or intended so to be, and each and every part thereof, and himself or by his attorneys or agents to have, hold, use, and enjoy the same, himself or by his superintendents, managers, receivers, or servants operating the said railroad and conducting the business thereof, and making, from time to time, all repairs and replacements and all useful alterations, additions, and improvements thereto, as fully as the parties of the first part might have done before such entry, and to collect and receive all tolls, freights, incomes, rents, issues, and profits of the same and of every part thereof; and, after deducting the expenses of operating said railroad and conducting its business and of all the said repairs, replacements, alterations, additions, and improvements, and all payment for taxes, assessments, charges, or liens on the said premises or any part thereof, as well as just com-

pensation for his own services, to apply the residue of moneys arising as aforesaid—

First. To the payment of the interest on such of aforesaid bonds as are hereinbefore described in the order in which such interest shall have become due.

Secondly. After paying all the aforesaid interest then due and making such provision as to the trustees may seem advisable for any half year's interest next to fall due to the payments required by these presents to be made into the sinking fund thereby provided; and, if at any time the moneys applicable to any class of the said payments shall not suffice to pay the said class in full, the said moneys shall be applied ratably toward such payments, and when all the said payments of every class shall have been made in full and no sale shall have been made in conformity hereto
136 the said trustee shall restore the possession of the said premises hereby conveyed unto the said parties of the first part, its successors or assigns: Provided, That if any of the defaults hereinbefore specified be subsequently made such restoration shall not nor shall any previous entry be construed to exhaust or in any manner impair the powers of entry or sale or any powers hereby granted to or conferred upon said trustee. In case default shall be made as aforesaid and shall continue as aforesaid it shall be lawful for the said trustee, after entry as aforesaid or other entry or without entry, himself or his attorneys or agents, to sell and dispose of all and singular the premises hereby conveyed or intended so to be or any portion thereof, and all right, benefit, and equity of redemption of the parties of the first part, their successors and assigns, at public auction, in the city of New York or in the city of St. Louis or in such place in the State of Illinois as the said trustee may designate, and at such time or times as he may appoint, having first given notice of the place and the time of such sale by advertisement published not less than six weeks in one or more newspapers in each of the said cities of New York and St. Louis, and to adjourn the said sale from time to time, in his discretion, and, if so adjourning, to make the same at the time and place to which the same may be so adjourned, and to sell and, as the attorney-in-fact of the said parties of the first part, their successors or assigns, for such purpose duly and irrevocably constituted, or in the name of the said trustee, to make and deliver to the purchaser or purchasers thereof good and sufficient deed or deeds in the law for the same, in fee simple, which sale, made as aforesaid, shall be a perpetual bar, both in law and equity, against the said parties of the first part, their successors and assigns, and all other persons claiming or to claim the said premises or any part thereof by, from, or under them or any of them, and to apply the proceeds of such sale, after deducting just allowances for all expenses of the said sale, including attorneys'
137 and counsel fees, and all other expenses, advances, and liabilities which may have been made or incurred by the said trustee in the operating or maintaining the said railroad or managing its business, and all payments for taxes, assessments, charges, or liens on the said premises or any part thereof, or in administering the

said trust, as well as compensation for his own services, in the manner following:

First. To the payment of the interest then due on the aforesaid bonds in the order in which such interest shall have become due; and

Secondly. To the payment of the principal of the aforesaid bonds, whether such principal be then due or not, and in case the portion of the said proceeds applicable to that object shall not suffice to make the payment of the principal of said bonds in full, the said portion shall be applied ratably towards the said payments.

And it is hereby declared that the receipt or receipts of the said trustee shall be a sufficient discharge to the purchaser or purchasers of the premises or any part thereof for his or their purchase-money; and that such purchaser or purchasers, his or their heirs, executors, or administrators, shall not, after payment thereof and having such receipt, be liable to see to its being applied upon or for the trusts and purposes of these presents or in any manner be answerable for any loss, misapplication, or non-application of such purchase-money or any part thereof, or be obliged to inquire into the necessity, expediency, or authority of or for any such sale: Provided always, and the grant and conveyance herein contained are upon the express condition, That if the said parties of the first part shall well and truly pay or cause to be paid the interest on the said bonds so issued or to be issued as aforesaid, as the same shall fall due and be demanded, and also the principal thereof when the same shall fall due, or shall exhibit the said bonds, canceled, to the said party of
138 the second part or his successors in the said trust, then the estate, title, and interest of the party of the second part and his successors in the trust shall cease, determine, and become void; otherwise they shall remain in full force and virtue.

And the said parties of the first part hereby agree to and with the said party of the second part and his successors that in case default shall be made by the said parties of the first part or their successors or assigns in the payment of any half year's interest on any of the said bonds at the time and in the manner in the coupon issued therewith provided, the said coupon having been presented and the payment of the interest therein specified been demanded, and in case such default shall continue for the period of six months after said coupon shall have become due, then and in that case the principal of the said bonds in respect to which such default shall have happened shall become due, and at the election of said trustee, to be made at any time, without notice, the principal of all the said bonds shall become due and payable, anything contained therein to the contrary notwithstanding: Provided, nevertheless, That the operation of this provision may be suspended in the cases and in the manner hereinafter expressed.

And the said parties of the first part hereby further covenant and agree to and with the said party of the second part and his successors that, for the further security and ultimate redemption of the aforesaid bonds, the said parties of the first part, their successors or assigns, will, on or before the first day of July in each and every

year until the principal of the said bonds shall be wholly paid, beginning on the first day of July, in the year one thousand eight hundred and seventy-two (1872), set apart and appropriate out of the earnings of the said railroad and will, on or before the said day, deposit with and pay to a commissioner to be hereafter appointed
139 by said company the full sum of twenty thousand dollars ($20,000), which sum, together with all accumulations of interest thereon that may actually come into the hands of the said commissioner, shall be invested by him in the purchase of the bonds herein designated as aforesaid, provided the same can be purchased at a rate not exceeding the par value thereof and interest; and the bonds so purchased shall be held by the said commissioner and immediately stamped or endorsed as belonging to the said sinking fund, but shall continue in force, and the interest thereon shall continue to be paid by the said parties of the first part, and the amount thereof shall be added to and applied as part of the capital of the sinking fund hereby established and be invested in the manner and within the limitations as herein provided.

That preparatory to the purchase of bonds as aforesaid the said commissioner shall give thirty days' notice thereof in a newspaper published in the city of New York, and shall make the said purchase at the lowest price or prices at which the same may be offered, but not exceeding the par and interest of said bonds; and in case the said bonds cannot be purchased at par and interest, as above, within reasonable time after the expiration of the notice aforesaid, then the said commissioner shall invest the said sinking fund moneys in the purchase of such bonds or securites as the parties hereto may direct, giving preference, however, to the securities of the United States of America.

And the said commissioner shall furnish, on reasonable notice to either party hereto, a statement or exhibit of the number and denomination and amount of the bonds or securities so purchased, which bonds and securities he shall also cause to be transferred and registered in books kept for that purpose in the name of the "commissioner of the sinking fund," so that the said books will at all times show what bonds and securities belong to said sink-
140 ing fund; and the said parties of the first part hereby covenant to and with the party of the second part and his successors and assigns in the trust herein created that the parties of the first part and their successors and assigns shall and will, from time to time and at all times hereafter, execute, deliver, and acknowledge all and every such further deeds, conveyances, and assurances in the law for the better assuring unto the party of the second part and his successors and assigns in the trust hereby created of the premises, in manner as above conveyed or expressed or intended to be, as well in reference to the property or things at any time or times hereafter acquired as to such as are now owned or possessed by the parties of the first part or for the better effectuating of the intent and object of these presents, as by the said party of the second part or his successors and assigns in the trust hereby created shall

be reasonably advised, devised, or required to carry out the true intent of these premises.

It is mutually agreed by and between the parties hereto that it shall be the duty of the trustee for the time being to exercise the power of entry or the power of sale hereby granted, or both, upon requisition in writing, as hereinbefore specified, as applicable to the several cases of default, subject to the qualifications hereinafter expressed, in the manner hereinafter provided, as follows:

I. If the default be as to the interest or principal of the said bonds the requisition shall be by the holders of three hundred thousand ($300,000) dollars of bonds, but the holders of a majority in amount of the said bonds may instruct the trustee to defer the entry for periods which shall not exceed six months at any one time or one year in all from the accrual of the right of entry, and may instruct the said trustee to defer the exercise of the power of sale for like periods, and the said majority may also for the period for
141 which such sale or entry shall be deferred suspend the provision of the said bonds whereby on default as to interest, as in the said bonds specified, the principal thereof will become due.

II. If the default be as to any payment into the sinking fund herein provided the requisition shall be by holders of a majority in amount of said bonds, but such may instruct the trustee to defer or omit the entry and the exercise of the power of sale according to their discretion, and whether so instructed or not the trustee, if he shall be satisfied that the said railroad, being well managed and its net earnings fairly applied first to the payment of interest on the said bonds, nevertheless fails to afford a surplus over such payments sufficient to make good the sinking fund, as herein provided, may, in his discretion, defer or omit the exercise of the powers of entry and sale: Provided, nevertheless, That the aforesaid provisions regulating the discretion of the trustee in the exercise of the aforesaid powers granted by these presents or either of them shall operate for such purpose only as between the trustee and the bondholder, and shall not nor shall either of the said provisions avail or be construed to operate as conditions to the valid or effectual exercise of the said powers or to defeat or affect any entry, sale, or conveyance which he may make by virtue of the powers of entry or sale granted by these presents; and it is mutually agreed by and between the parties hereto, as a condition on which the party of the second part has assented to these presents, that until a default and requisition, as hereinbefore specified, the trustee for the time being shall not be required to perform any active duty; that the said trustee may at all times and in all cases act in the said trust by one or more of such attorneys, agents, and servants as he may from time to time constitute or appoint as validly in all respects as if acting personally; that the said trustee shall not be in any manner responsible for any
142 default or misconduct of any such attorney, agent, or servant whom he may at any time so constitute or appoint or for anything other than his own willful default or misconduct; that the said trustee shall be entitled to just compensation for all services which he may hereafter render in his trust; that a resolution

adopted by a majority in interest of the said bondholders requesting, approving, or ratifying any act or omission on the part of said trustee shall be full and conclusive justification of him as against each and all of the holders of said bonds and shall acquit and discharge him from all accountability to such holders for and in respect to such act or omission, but this provision shall not be construed to authorize any deviation from the rule established by these presents for the distribution of the net earnings or proceeds of the said railroad and property among said bondholders according to their respective interests; that the said trustee may resign and discharge himself of the trust created by these presents by notice in writing to the parties of the first part or their successors or assigns and also to the immediate successor of said trustee, if such successor shall have been designated or in conformity to the provisions herein contained; that the said trustee may be removed by a majority in interest of the holders of the aforesaid bonds, the said votes being had at meetings of the said bondholders duly held and attested by an instrument under the hands and seals of the persons so voting and acknowledged in the manner required in the State of Illinois in order to entitle a conveyance to be recorded; that in case the party of the second part shall die, resign, or be removed his successor shall be appointed in the manner following, to wit:

First. By the holders of a majority in interest of the said bonds, if done within sixty days after such vacancy shall have occurred.

Second. By the parties of the second part, their successors or assigns.

143 Third. By the district court of the United States for the district of Illinois, on application of the holders of three hundred thousand ($300,000) dollars of the said bonds.

The word "trustee," as used in these presents, shall be construed to mean the trustee who may be at the time acting; that upon the accession or appointment of any new trustee he shall become vested with all the powers and authorities and estates granted to or conferred upon the trustee or party of the second part by these presents, and all the rights and interests requisite to enable the person so acceding to execute the purposes of this trust without any further assurance or conveyance; but all conveyances and other instruments shall be from time to time executed by the said trustee and by the parties of the first part which shall be necessary for the purpose of assuring the legal estate in the premises to the trustee who shall for the time being be designated as successor in the said trust; and upon the death, removal, or resignation of any trustee all his powers and authorities by virtue hereof shall cease.

And it is agreed between the parties to this indenture that in the meantime, and until default shall be made in the payment of the principal or interest of the said bonds or some of them, or some part thereof, or in the payments into the sinking fund, or in some of the covenants or agreements herein contained to be kept by the said parties of the first part, it shall be lawful for the said parties of the first part and their successors peaceably and quietly to have, hold, use, possess, and enjoy the said premises, with the appurte-

nances, and to operate and maintain the said railroad and property, and to receive the incomes, tolls, rents, issues, and profits thereof to their own use and benefit, without any hindrance or interruption, suit or disturbance whatever of or by the said party of the second part or his successors in the trust or any other person
144 whatever lawfully claiming or to claim the same by, from, or under him or them or any of them.

In witness whereof the said party of the first part to these presents hath set its corporate seal and the president and treasurer, duly authorized by resolutions of said company, have, for and in behalf of said company, subscribed the same.

[Seal St. L., V. & T. H. R. R. Co.]

THE ST. LOUIS, VANDALIA AND TERRE HAUTE RAILROAD COMPANY,
By J. P. M. HOWARD, *President.* [SEAL.]
WILLIAM S. SMITH, *Treasurer.* [SEAL.]

Sealed and delivered in the presence of—
E. F. WINSLOW.
T. B. RINEHART.

(Stamps required by law placed upon the bonds.)
J. T. THOMAS, *Trustee.* [SEAL.]

Witnesses to signature of J. T. Thomas:
JOHN H. BRADLEY.
E. F. WINSLOW.

Acknowledged by J. T. Thomas, trustee, before Edmund Wilcox, notary public, city of Philadelphia, March 20 1867; by J. P. M. Howard, president, before D. Rinehart, county clerk, Effingham county, Illinois, March 25, 1867; by William S. Smith, treasurer, before Henry Howard, notary public, Bond county, Illinois, April 6, 1867.

Recorded, Bond county, Illinois, April 8th 1867, in Book six (6) of Mortgages, pages 40 to 49, inclusive; Madison county, Illinois, April 15th, 1867, in Book 89, pages 247 to 255, inclusive; St. Clair county, Illinois, May 20th, 1867, in Book M 4, pages 33 to 42, inclusive; Fayette county, Illinois, June 6th, 1867, Book No. 9,
145 pages 489 to 499, inclusive; Effingham county, Illinois, June 8th, 1867, Book 2 of Mortgages, pages 332 to 340, inclusive; Cumberland county, Illinois, June 10th, 1867, Book C of Mortgages, pages 438 to 449, inclusive; Clark county, Illinois, June 12th, 1867, Book F of Mortgages, pages 1 to 11, inclusive.

EXHIBIT "F."

Mortgage.

St. Louis, Vandalia and Terre Haute Railroad Company to J. Edgar Thomson and Chauncy Rose, trustees.[b] $2,600,000. Dated March 13, 1868.

ST. LOUIS, VANDALIA & TERRE HAUTE RAILROAD CO.
versus
TERRE HAUTE & INDIANAPOLIS RAILROAD CO.

This indenture, made this thirteenth day of March, in the year of our Lord one thousand eight hundred and sixty-eight, by and between the St. Louis, Vandalia and Terre Haute Railroad Company, of the first part, and J. Edgar Thomson, of Pennsylvania, and Chauncey Rose, of Indiana, of the second part, witnesseth:

Whereas the said parties of the first part are a corporation organized and existing under the laws of the State of Illinois, and
146 are desirous of raising the means necessary for the construction of the St. Louis, Vandalia and Terre Haute railroad under and by virtue of said laws and completing and equipping the same, and have been authorized by a resolution of their board of directors to make, execute, and deliver bonds in the forms and for the amounts hereinafter specified, secured by mortgage, to the amount of two million six hundred thousand dollars, which resolution was passed at a meeting of said board of directors held at Greenville, in the county of Bond and State of Illinois, on the said thirteenth day of March, one thousand eight hundred and sixty-eight, and authorized the president of said board to make, execute, and deliver and the secretary of said board to countersign said bonds to the amount and in the manner hereinafter specified—that is to say, the said bonds, to the amount of one million six hundred thousand dollars, to be issued in sums of one thousand dollars each, to be numbered consecutively, to be dated of even date herewith, and made payable, thirty years after the first day of May next, in the city of New York, bearing interest at the rate of seven per centum per annum, payable semi-annually, at said city of New York, on the first days of May and November in each year, to be secured by mortgage upon all the property, rights, franchises, leases, and estates of whatsoever kind now held or hereafter to be acquired by said company, and to be in form and substance following, to wit:

UNITED STATES OF AMERICA, *State of Illinois.*

$1,000. $1,000.

St. Louis, Vandalia and Terre Haute Railroad Company.

Mortgage Bond.

147 Know all men by these presents that the St. Louis, Vandalia and Terre Haute Railroad Company are indebted to R.

W. Thompson, or bearer, in the sum of one thousand dollars, lawful money of the United States of America, which the said company promise to pay to the bearer hereof on the first day of May, A. D. one thousand eight hundred and ninety-eight, at the city of New York, with interest thereon at the rate of seven per centum per annum, payable semi-annually, at the city of New York, on the first days of May and November in each year, on the presentation and surrender of the annexed coupons as they severally become due; and in case of non-payment of interest for any half year, if demanded and the same remain unpaid for six continuing months thereafter, the principal shall become due and payable.

This bond is one of an issue of two million six hundred thousand dollars of bonds of the same date, the payment of which is secured by a mortgage on the railroad, property, equipments, and franchises of said company, duly executed and delivered to J. Edgar Thomson, of Pennsylvania, and Chauncey Rose, of Indiana, as trustees, bearing even date herewith and duly recorded.

This bond shall not become obligatory until it shall have been authenticated by a certificate annexed to it by the said trustees. It may be transferable by delivery or it may be registered on the books of the company at the option of any holder; and after such registry and the endorsement of the certificate thereof upon the bond no transfer shall be valid unless such transfer shall be registered on the books of said company or until it has been released from such registry on said books.

In witness whereof the said company have caused their corporate seal to be hereto affixed and their president to sign and their secretary to countersign the same, and have caused the coupons
148 hereto annexed to be signed by their secretary this thirteenth day of March, in the year of our Lord one thousand eight hundred and sixty-eight.

[SEAL.] ——— ———, *President.*

Countersigned by—
——— ———, *Secretary.*

And whereas the said board of directors, at their aforesaid meeting, directed the said bonds, to the amount of one million of dollars, to be issued in sums of one thousand dollars each; also to be numbered consecutively, to be dated of even date herewith, and payable in like manner, and bearing the same rate of interest; also payable in like manner with the bonds first aforesaid, and also to be secured by the mortgage aforesaid, but with this condition attached thereto: That the said last-named bonds, numbered from one (1) to one thousand (1,000), both inclusive, shall be convertible into the capital stock of said company, at the pleasure of the holders thereof, at any time prior to the first day of May, one thousand eight hundred and seventy-eight, and to be in form and substance following, to wit:

UNITED STATES OF AMERICA, *State of Illinois.*

$1,000. $1,000.

St. Louis, Vandalia and Terre Haute Railroad Company.

Mortgage Bond.

Know all men by these presents that the St. Louis, Vanda-
149 lia and Terre Haute Railroad Company are indebted to R. W. Thompson, or bearer, in the sum of one thousand dollars, lawful money of the United States of America, which the said company promise to pay to the bearer hereof on the first day of May, A. D. one thousand eight hundred and ninety-eight, at the city of New York, with interest thereon at the rate of seven per centum per annum, payable semi-annually, at the city of New York, on the first days of May and November in each year, on the presentation and surrender of the annexed coupons as they severally become due, and in case of non-payment of interest for any half year, if demanded and the same shall remain unpaid for six continuing months thereafter, the principal shall become due and payable.

This bond is one of an issue of two million six hundred thousand dollars of bonds of the same date, the payment of which is secured by a mortgage on the railroad, property, equipments, and franchises of said company, duly executed and delivered to J. Edgar Thomson, of Pennsylvania, and Chauncey Rose, of Indiana, as trustees, bearing even date herewith and duly recorded.

This bond shall not become obligatory until it shall have been authenticated by a certificate annexed to it by the said trustees. It may be transferable by delivery or it may be registered on the books of the company at the option of any holder; and after such registry and the endorsement of the certificate thereof upon the bond no transfer shall be registered upon the books of the company or until it has been released from such registry on said books.

This bond may be converted into the capital stock of the said St. Louis, Vandalia, and Terre Haute Railroad Company at the pleasure of the holder thereof (hereof?), at any time prior to the first day of May, one thousand eight hundred and seventy-eight.

In witness whereof the said company have caused their cor-
150 porate seal to be hereto affixed and their president to sign and their secretary to countersign the same, and have caused the coupons hereto annexed to be signed by their secretary this thirteenth day of March, A. D. 1868.

—— ——, *President.*

Countersigned by—
—— ——, *Secretary.*

Now, therefore, the parties of the first part do by this indenture, in consideration of the premises and of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, and in order to secure the payment of the principal and the interest of the bonds aforesaid and every part of the same as they may become due and

payable, have granted, bargained, and sold, conveyed, and transferred, and do by these presents grant, bargain, sell, convey, and transfer, unto the said party of the second part and to their successors and assigns all the rights, privileges, franchises, and property, of whatever description, now owned or that may be hereafter acquired by the said party of the first part, including all their railroad constructed or to be constructed by them under the laws of the State of Illinois, whatsoever number of miles the same may be in length, and all their railways, ways, and rights of way, depot grounds, and other lands; tracks, bridges, viaducts, culverts, and other structures; depots, station-houses, engine-houses, car-houses, freight-houses, wood-houses, and other buildings; machine shops and other shops; locomotives, tenders, cars and other rolling stock or equipment; machinery, tools, implements, fuel, and material for constructing operating, and repairing or replacing the said railroad or any part thereof; the tenements, hereditaments, and appurtenances belonging or in anywise appertaining to said railroad, and all the reversions, remainders, tolls, incomes, rents, issues,
151 and profits thereof, whether any of the said property, rights, and interests are now held or may be hereafter acquired by the said party of the first part; reserving, nevertheless, to the party of the first part full power to sell or exchange any lands at any time held by them for the purposes of said railroad, but the lands acquired by substitution for any so sold or exchanged shall become subject to the operation of this mortgage as effectually as if they were now owned by the party of the first part and were herein specifically described; and reserving also to the said party of the first part full power, from time to time, to dispose of, according to their discretion, such portions of said equipments, machinery, and implements as may become unfit and unnecessary and to replace the same:

To have and to hold the above-described rights, property, franchises, tenements, and hereditaments and all the said premises and appurtenances, subject to the aforesaid reservations and conditions, unto said party of the second part and their successors and assigns, to be held by them under this mortgage, to secure the payment of all the principal and interest of all the aforesaid bonds, to their use and behoof for that purpose, subject, nevertheless, to the following further conditions, to wit: In case default shall be made in the payment of the principal and interest of any of said bonds, according to their terms and the terms of the coupons thereto annexed, or in any condition herein required to be performed by the said party of the first part, and if such default shall continue for the period of six months thereafter, it shall be lawful for the said parties of the second part, as trustees under this mortgage, by themselves, their agents or attorneys, to enter into and upon all and singular the rights, property, franchises, and premises hereby conveyed or that may be hereafter acquired and then held and enjoyed by the party of the first part, and to have, hold, occupy, use, and enjoy
152 the same, by themselves or by whomsoever they may appoint, for the purpose of operating said railroad and conduct-

ing the business thereof and making, from time to time, all necessary repairs, alterations, and improvements thereto to the same extent as if same were held and done by the said party of the first part, and to collect and receive all tolls, freights, incomes, rents, issues, and profits of said railroad in the same manner as the said party of the first part may or might do if there had been no such default; and after deducting the necessary expenses of operating and conducting the said railroad and of whatsoever repairs, alterations, and improvements may be made thereon by the said trustees, their agents or attorneys, and all payments and charges for taxes, charges, or liens on the property and interests hereby conveyed, as well as a just compensation for their services, to apply the residue of the moneys arising as aforesaid to the payment of the interest on such of the aforesaid bonds as may be then unpaid, in the order in which the same shall become due, and to make provision, if they shall deem it advisable, for any half year's interest next to fall due and to the payment of all of the aforesaid bonds that may be then unpaid; and if at any time the moneys applicable to any such payments shall not be sufficient to pay the same in full, then they shall be applied ratably towards the same, and when all the said bonds and the interest thereon shall have been paid in full and no sale shall have been made of said railroad in conformity to the provisions hereof, then the said trustees shall restore the said railroad and premises to the possession of the party of the first part, their successors or assigns: Provided, That, if any defaults hereinbefore specified shall be subsequently made, such restoration shall not nor shall any previous entry exhaust or impair any of the powers hereby granted to and conferred upon the said party of the second part.

In case default shall be made as aforesaid and shall con-
153 tinue as aforesaid it shall be lawful for the said trustees, after or without entry, by themselves, their agents or attorneys, to sell and dispose of all and singular the premises hereby conveyed or intended to be conveyed, and all the right, benefit, and equity of redemption of the party of the first part, their successors and assigns, at public auction in the city of New York, or in the city of St. Louis, or at such place in the State of Illinois as the said trustees may designate, and at such time or times as they may appoint, first having given notice thereof by advertisement, published not less than six weeks, in one or more newspapers in each of the said cities of New York and St. Louis, and to adjourn the said sale from time to time, in their discretion, and thereafter to make the same in the same manner as if there had been no adjournment thereof, and to sell, and as the attorneys-in-fact of the said parties of the first part, their successors or assigns, for such purpose hereby duly and irrevocably constituted and appointed, or in their own names to make and deliver to the purchaser or purchasers thereof a good and sufficient deed or deeds, in fee simple, for the same, which sale, when so made, shall be a perpetual bar, both in law and equity, against the parties of the first part, their successors and assigns, and shall perpetually estop them and all others claiming or to claim under them from setting up any such claim or demand, and to apply the proceeds of

such sale, after deducting just allowances for all the expenses of such sale, including attorney and counsel fees, and all the advances and liabilities that may have been made or incurred by said trustees in acting under this mortgage, and in administering and executing the trust hereby conferred upon them, as well as compensation for their own services, in the manner following, to wit:

First. To the payment of the interest then due on said bonds in the order in which it shall have become due; and,

154 Secondly. To the payment of the principal of said bonds, whether such payment be then due or not.

And in case the portion of said proceeds applicable to that object shall not be sufficient to pay the principal and interest of said bonds in full, the same shall be applied ratably towards the said payments.

And the party of the first part hereby stipulate and agree that they will indemnify and save harmless the said trustees against any loss on account of expenses or money necessarily paid out by them in administering the trust hereby created, and it is hereby declared that the receipt or receipts of the said trustees shall be a sufficient discharge to the purchaser or purchasers of the premises for his or their purchase-money, and that they, after obtaining such receipt or receipts, shall not be held answerable for any loss, misapplication, or non-application of such purchase-money, or be obliged to inquire into the authority of or for any such sale, or of its necessity or expediency: Provided always, and this indenture is upon the express condition, That if the party of the first part shall well and truly pay or cause to be paid the interest on said bonds as the same shall fall due and be demanded, and also the principal thereof, when the same shall fall due, or shall have possession of the said bonds, canceled, then the estate, rights, title, and interest of the party of the second part and their successors in the trust hereby created shall cease, determine, and become void; otherwise they shall be and remain in full force and virtue.

And the party of the first part hereby agree to and with the said party of the second part and their successors that if they shall make default in the payment of any half year's interest on any of said bonds, as provided for in the coupons thereto annexed, the said coupons having been presented and the payment thereof demanded, and in case any such default shall continue for six continuing months after said coupons shall have become due, then and

155 in that case the principal of said bonds in respect to which such default shall have happened shall become due and, at the election of said trustees, to be made at any time without notice, the principal of all the said bends shall become due and payable, anything therein contained to the contrary notwithstanding:

Provided, nevertheless, That the operation of this provision may be suspended in the cases and in the manner hereinafter expressed.

And the party of the first part hereby covenant with the party of the second part and their successors and assigns that they and their successors and assigns shall and will, from to time and whenever the same may be required, execute, acknowledge, and deliver all such further deeds and conveyances as may be necessary to the

proper and full execution of the trusts hereby created and for the better execution of the intent and object thereof, as expressed by this indenture, as the said trustees shall require of them for that purpose.

It is mutually agreed by and between the parties hereto that it shall be the duty of the trustees for the time being, under this indenture, to exercise the power of entry or sale hereby conferred upon and granted to them or both upon the requisition in writing and subject to the conditions and qualifications hereinafter expressed, as follows:

Whether the default be as to the interest or principal of said bonds, the requisition shall be by the holders of three hundred thousand dollars of bonds, but the holders of a majority in amount of the said bonds may instruct the said trustees to defer the entry for periods which shall not exceed six months at any one time or one year in all from the time the right of entry accrued, and may instruct the said trustees to defer the exercise of the power of sale for like periods; and the said majority may also, for the period
156 for which such sale or entry shall be deferred, suspend the provisions of the said bonds whereby, on default as to interest, the principal thereof may become due:

Provided, nevertheless, That the aforesaid provision regulating the discretion of the said trustees in the exercise of the powers hereby conferred upon them shall operate for such purpose only as between the said trustees and the holders of the said bonds, and shall not avail or be construed to operate as conditions to the valid or effectual exercise of the said powers or to defeat or affect any entry, sale, or conveyance made by virtue of the powers of entry or sale granted and conferred by these presents.

And it is mutually agreed by and between the parties to this indenture, as a condition on which the aforesaid trustees have assented hereto, that until a default or requisition as aforesaid the said trustees shall not be required to perform any active duty; that they may at all times act by one or more agents or attorneys, to be appointed by them, as validly in all respects as if acting personally; that they shall not be in any manner responsible for any default or misconduct of any such agents or attorneys or for anything other than their own willful default or misconduct; that they may be removed by a majority in interest of the holders of said bonds, the votes of said bondholders being had at a meeting or meetings of said bondholders duly held and attested by a proper instrument in writing under the hands and seals of the bondholders so voting, which writing shall be acknowledged in the manner required by the laws of the State of Illinois for the acknowledgment of deeds and conveyances of real estate, and that in case the said trustees or either of them shall die or resign or be removed their or his successors shall be appointed in the manner following, to wit:

First. By the holders of a majority in interest of the said bonds, if done within sixty days after such vacancy shall have occurred.

157 Second. By the party of the first part, their successors or assigns; and,

Third. By the district court of the United States for the district of Illinois, on application thereto by the holders of three hundred thousand dollars of the said bonds. The word "trustee," as used in this indenture, shall be construed to mean the mortgagees hereinbefore mentioned and their successors, all of whom shall have full and ample powers to execute this trust without any further conveyance or agreement; but, nevertheless, all such conveyances and other instruments as shall be necessary to assure the legal title in the premises to the said trustees or to their successors shall be made and executed by the parties to this indenture; and upon the removal or resignation of any of said trustees all their powers and authority by virtue hereof shall cease. It is hereby understood and provided that this mortgage is subject to a first and prior mortgage heretofore executed and delivered by the said St. Louis, Vandalia and Terre Haute Railroad Company to Joseph T. Thomas for securing the payment of the principal and interest of other bonds issued by said company, to the amount of one million nine hundred thousand dollars, which mortgage was authorized by the board of directors of said company at a regular meeting held, at Greenville, Bond county, in the State of Illinois, on the twelfth day of February, one thousand eight hundred and sixty-seven, and was executed by the president of said company according to law.

And it is also hereby expressly understood and agreed by and between the parties to this indenture that in the meantime, and until default shall be made in the payment of the principal or interest of said bonds or of some part thereof or in some of the covenants or agreements herein contained and to be performed and kept by the said party of the first part, it shall be lawful for the said

158 party of the first part and their successors and they shall have the right peaceably and quietly to have, hold, use, possess, and enjoy the said rights, property, franchises, premises and appurtenances, and to operate and maintain the said railroad and property and to receive the incomes, tolls, rents, issues, and profits thereof to their own use and benefit, without any hindrance or interruption, suit or disturbance whatever of or by the said trustees or their successors in this trust or any person whomsoever lawfully claiming or to claim the same by, from, or under said trustees or their successors or either of them.

In witness whereof the said St. Louis, Vandalia and Terre Haute Railroad Company have caused their corporate seal to be hereto affixed and the president to sign this mortgage deed on this thirteenth day of March, in the year of our Lord one thousand eight hundred and sixty-eight. The bonds to secure which this mortgage is given are duly stamped pursuant to the provisions of the internal revenue law of the United States.

[Seal St. L., V. & T. H. R. R. Co.]

J. F. ALEXANDER,
President of St. Louis, Vandalia and Terre Haute Railroad Compaay.

Done and executed in our presence—
SAM'L B. HYNES.
WILLIAMSON PLANT.

Acknowledged by Jediah F. Alexander, president, before Henry Howard, notary public, Bond county, Illinois, March 13, 1868.

Recorded, Clark county, Illinois, May 27, 1868, in Mortgage Book F, page 102; Cumberland county, February 11, 1879, in Mortgage Book F, page 245; Effingham county, March 4, 1879, in Book No. 21, page 316; Fayette county, March 22, 1879, in Book No. 44, page 116; Bond county, April 21, 1871, in Book 12, page 293; Madison county, May 5, 1879, in Book No. 144, page 284; St. Clair county, May 13, 1879, in Book No. 152, page 4.

159 The undersigned having been appointed trustee under and by the above and foregoing mortgage in association with J. Edgar Thomson, of Pennsylvania, hereby assents to and accepts the said trust upon the terms and conditions set forth in the aforesaid mortgage.

Terre Haute, Indiana, April 13, 1868.

CHAUNCEY ROSE.

In presence of—
W. R. McKEEN.

The undersigned having been appointed trustee under and by the above and foregoing mortgage in association with Chauncey Rose, of Indiana, hereby assents to and accepts the said trust upon the terms and conditions set forth in the aforesaid mortgage.

Philadelphia, Pennsylvania, 1868.

J. EDGAR THOMSON.

In presence of—
—— ——.

EXHIBIT "G."

Resolution of the Board of Directors of the St. Louis, Vandalia and Terre Haute Railroad Company Relative to Gross Receipts to be Allowed the Terre Haute and Indianapolis Railroad Company.

ST. LOUIS, VANDALIA & TERRE HAUTE RAILROAD CO.
versus
TERRE HAUTE & INDIANAPOLIS RAILROAD CO.

GREENVILLE, ILLINOIS, *January* 12, 1869.

Whereas, at the time of the execution of the lease of the St.
160 Louis, Vandalia and Terre Haute railroad to the Terre Haute and Indianapolis Railroad Company, to wit:

On the tenth day of February, 1868, it was agreed and understood that the amount to be allowed to the last-named company for operating the said road should be seventy (70) per cent. of the gross receipts instead of sixty-five (65) per cent., as it now stands in said lease: Therefore,

Resolved, That the president be, and he is hereby, authorized to

change the terms of said lease so that when the said sixty-five (65) per cent. occurs therein it shall read seventy (70) per cent., and that the said Terre Haute and Indianapolis Railroad Company shall be allowed seventy (70) per cent. of the gross receipts from all traffic moved over the line of said road or business done thereon in the same manner as if it were so provided in the said original lease, but if the working and maintenance expenses of said road shall be less than seventy (70) per cent. of the gross receipts aforesaid, then all of such excess shall be paid over to the St. Louis, Vandalia and Terre Haute Railroad Company.

A true copy.

WILLIAMSON PLANT, *Secretary.*

EXHIBIT "H" to Bill of Complaint.

ST. LOUIS, VANDALIA & TERRE HAUTE RAILROAD CO.
versus
TERRE HAUTE & INDIANAPOLIS RAILROAD CO.

An act to amend the law for the consolidation of railroads.

SECTION 1. Be it enacted by the people of the State of Illinois represented in the General Assembly, That it shall not be lawful for any railroad company of Illinois or for the directors of any
161 railroad company of Illinois to consolidate their road with any railroad out of the State of Illinois, or to lease their road to any railroad company out of the State of Illinois, or to lease any railroad out of the State of Illinois, without having first obtained the written consent of all of the stockholders of said roads residing in the State of Illinois, and any contract for such consolidation or lease which may be made, without having first obtained said written consent, signed by the resident stockholders in Illinois, shall be null and void: Provided, That it shall be lawful for the directors of any railroad company created by the laws of this State to contract for the use and operation of any railroad connecting with their line beyond the limits of the State, and in all contracts for the use and operation of any railroad by another corporation it shall be lawful for the parties to provide for the use of any of the powers and privileges of either or both of the corporations parties thereto: And provided further, That nothing in this act shall be so construed as to authorize the consolidation of any of said railroads with railroads out of the State of Illinois: Provided, That nothing contained in the first proviso to this act shall in anywise apply to or be taken advantage of by the Great Western Railroad Company (of 1859), a corporation of the State of Illinois.

SEC. 2. This act shall take effect and be in force from and after the passage thereof.

Approved February 16, 1865.

(Indorsed:) Filed January 11, 1888. James T. Jones, clerk.

Afterwards, to wit, on the twenty-fourth day of January, in the year of our Lord one thousand eight hundred and eighty-eight, came again the defendant, by its solicitors, and filed in the clerk's office of said court its demurrer to the amended bill of complaint; which demurrer is as follows, to wit:

162 In the Circuit Court of the United States for the Southern District of Illinois, *ss:* In Chancery.

THE ST. LOUIS, VANDALIA & TERRE HAUTE RAILROAD COMPANY
vs.
THE TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY.

The demurrer of the Terre Haute & Indianapolis Railroad Company, defendant, to the amended bill of complaint filed in the above-entitled cause.

The said defendant, The Terre Haute & Indianapolis Railroad Company, by its solicitors, hereby demurs to the said amended bill of complaint and to the said several parts thereof hereinafter indicated, because the same are insufficient in law, and for cause of demurrer said defendant assigns the following reasons:

The entire amended bill is insufficient:

First. Because there is no equity disclosed on the face thereof.

Second. Because the complainant has a complete remedy at law for all said supposed grievances.

Third. If complainant ever had any right to proceed in equity on any of the grounds stated in the amended bill such right has been lost by the long delay of complainant and its laches in that behalf.

For said reasons, and for other reasons apparent on the face of the said amended bill, the defendant says that the same and the
163 said several parts thereof are insufficient in law, and defendant prays judgment of the court whether it shall be required to make other or further answer to said amended bill or any part thereof.

GREENE & HUMPHREY,
JOHN G. WILLIAMS,
Solicitors for the Terre Haute & Indianapolis Railroad Company.

GEO. HOADLEY,
WM. M. RAMSEY,
Of Counsel.

John G. Williams respectfully shows to the court that he is one of the counsel for the said Terre Haute & Indianapolis Railroad Company, defendant in the above-entitled cause, and certifies that, in his opinion, the demurrer to the said amended bill of complaint of the St. Louis, Vandalia & Terre Haute Railroad Company is well founded in point of law.

JOHN G. WILLIAMS.

STATE OF INDIANA, } ss:
County of Vigo, }

Before me, a notary public in and for the county of Vigo, at my office, in Terre Haute, came John G. Williams, and being by me first duly sworn, he deposes as follows:

I, John G. Williams, upon my oath do say that I am general counsel of the Terre Haute & Indianapolis Railroad Company, defendant in the above-entitled cause, and that the foregoing demurrer has been interposed in behalf of said defendant company, and I further say that the said demurrer is not and has not been interposed for delay.

JOHN G. WILLIAMS.

Subscribed and sworn to before me this 23rd day of January, A. D. 1888.

[SEAL.] JOHN R. HAGER,
Notary Public.

(Endorsed:) Filed January 24, 1888. James T. Jones, clerk.

164 Then, afterwards, to wit, on the twenty-fourth day of January, in the January term of said court, in the year 1888, the following further proceedings were had in said court in said cause and entered of record, to wit:

Decree Sustaining Demurrer to Amended Bill, Dismissing, &c.

ST. LOUIS, VANDALIA AND TERRE HAUTE RAILROAD COMPANY
vs.
TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY. } In Chancery.

This cause came on to be further heard on the demurrer of the defendant to the amended bill of complaint of the complainant; and thereupon, the court being fully advised in the premises, it is ordered, adjudged, and decreed that the said demurrer be sustained, and that the said amended bill of complaint be dismissed, and the said defendant have and recover of the said complainant its costs in this behalf sustained, &c.

And thereupon the said complainant prays an appeal to the Supreme court of the United States from said order and decree sustaining said demurrer to said amended bill and dismissing the
165 same at the costs of the complainant; which said appeal is hereby in open court allowed upon the complainant entering into bond, with J. T. Brooks and Samuel M. Nickerson its sureties, in the penal sum of one thousand dollars ($1,000.00), conditioned according to law, within thirty days from the entering of this decree.

Opinion of Court.

GRESHAM, *J.:*

The complainant, The St. Louis, Vandalia & Terre Haute Railroad Company, was chartered by an act of the General Assembly of the State of Illinois, approved February 10, 1865, to construct and operate a railroad from the bank of the Mississippi river, opposite East St. Louis, to the eastern boundary of the State of Illinois, at a point most convenient for extending the same to the city of Terre Haute, in the State of Indiana, and this charter was amended by an act approved February 8, 1867. The defendant was chartered by an act of the General Assembly of the State of Indiana, passed January 26, 1847, under the name of the "Terre Haute & Richmond Railroad Company," with power to construct and operate a railroad from a point on the western line of the State of Indiana, easterly through Terre Haute to Richmond, in the same State, and by an act passed March 6, 1865, the name of the defendant was changed to the name it now bears.

The bill avers that the complainant was not authorized by its charter to part with the possession of its property and franchises indefinitely or for a fixed period of time, by a lease or other contract, and that the defendant was not authorized by its charter to acquire, by like means, the possession, management, or control of any railroad located beyond the limits of the State of Indiana for an indefinite or fixed period; that in order to secure money to construct and equip its road the complainant, on April 6, 1867, executed a mortgage or deed of trust, dated January 1, 1867, conveying to trustees all its railway and equipment to secure the payment of bonds aggregating $1,900,000, drawing interest at the rate of 7 per cent. per annum, in which instrument it was provided that, beginning on July 1, 1872, there should be set apart and paid to a commissioner out of the earnings of the railroad $20,000 annually as a sinking fund for the redemption of these bonds; that on March 13, 1868, the complainant executed its second mortgage or deed of trust to secure the payment of an additional issue of bonds aggregating $2,600,000, drawing 7 per cent. interest; that these two issues of bonds were all sold and the proceeds thereof applied to the construction and equipment of the railroad; that they are all outstanding, unpaid, and no sinking fund has been created, as provided in the first mortgage; that on the tenth of February, 1868, the complainant executed a pretended lease of its railroad, property, and franchises to the defendant for the period of 999 years, which is set out in the bill as follows:

"Whereas a contract for the construction and equipment of the St. Louis, Vandalia & Terre Haute railroad, belonging to a corporation of the State of Illinois, has been entered into this day, by which arrangements have been made to complete and equip said road between East St. Louis and the State line of Indiana in the manner set forth in said contract; and whereas the Terre Haute & Indianapolis Railroad Company, a corporation of the State of Indiana, has proposed to construct without delay a first-class railroad, being an extension of their present road from Terre Haute to the State line

of Indiana, upon such location as will connect properly and directly with the St. Louis, Vandalia & Terre Haute railroad at the State line of Illinois; and whereas it is desirable that the said lines when connected should be operated by the Terre Haute & Indianapolis Railroad Company as one road between Indianapolis and St. Louis, and the said Terre Haute & Indianapolis Railroad Company having proposed to lease and operate the said St. Louis, Vandalia & Terre Haute railroad for a period of nine hundred and ninety-nine (999) years:

166 "It is therefore agreed—First. That upon completion of the road between East St. Louis and the State line of Indiana the Terre Haute & Indianapolis Railroad Company shall take charge of and operate the same with its equipment, for a period of nine hundred and ninety-nine (999) years, for which they shall be allowed sixty-five (65) per cent. of the gross receipts from all traffic moved over the line or business done thereon, and from the property of the company, as a consideration for working and maintenance expenses, the remaining thirty-five (35) per cent. to be appropriated as follows: (1) To the payment of interest on the first and second mortgage bonds of the St. Louis, Vandalia & Terre Haute Railroad Company, according to their legal priority. (2) All the surplus of said thirty-five (35) per cent. to be paid over to the St. Louis, Vandalia & Terre Haute Railroad Company (semi-annually), to be disposed of by it for the benefit of its stockholders. If the thirty-five per cent. should, from any cause, not be sufficient in amount to protect the interest on mortgage bonds and sinking funds therefor, as they mature from time to time, together with the payment of taxes and proper cost of maintaining organization, so that the rights of stockholders may be preserved, then and in that event the lessee shall advance for the company whatever amounts may be needed, to be accounted for under the yearly averages of this lease during the contract.

"It is further agreed that the Terre Haute & Indianapolis Railroad Company as lessee shall enjoy all the rights, powers, and privileges of the St. Louis, Vandalia & Terre Haute Railroad Company, so far as the same may be needful to maintain and operate said railroad; and to impose and collect tolls and rates for transportation, and do all other acts and things as fully and effectually as the said St. Louis, Vandalia & Terre Haute Railroad Company could do if operating said line, it being always understood and agreed that the gross proceeds from through or joint traffic or business shall be divided on the *pro rata* basis per mile for distances moved on the road of each party."

The bill further avers that on January 12, 1869, and after the bonds had been sold, as previously stated, the board of directors of the complainant adopted a resolution declaring that the defendant should be allowed 70 per cent. out of the gross receipts, instead of 65 per cent., for operating the road, and that by agreement between the parties the lease should be modified only to the extent of substituting in it 70 per cent. for 65 per cent.; that by a statute of the State of Illinois, in force at the time the pretended lease was executed, no railroad

company in the State of Illinois was allowed to lease its railroad and other property and franchises to any foreign railroad company, without having first obtained the written consent of all stockholders residing in that State; and that the pretended lease was executed without the written consent of 59 stockholders who then resided in Illinois; that on the completion of the construction and equipment of the road, on July 1, 1870, the defendant took possession and control of the same, and from that time to the present has operated the entire property under the franchises granted to the complainant, and has received in tolls and other earnings more than $21,600,000; that the pretended lease is void, because neither the plaintiff nor the defendant was authorized by the States which created them to enter into such a contract; that the defendant is liable as trustee to account to the complainant for all the property embraced in the pretended lease, together with all receipts and profits derived from the management and operation thereof, and to restore immediately to the complainant the full control and possession of all its property, and its earnings, after deducting reasonable disbursements made by the defendant in the care, management, and maintenance of the same; that the defendant has refused to deliver to the complainant, on demand, its property and the earnings derived therefrom; that during the entire period the defendant has been in possession of the railroad it has failed to pay over to the complainant, according to the terms of the lease, the latter's full share of the gross receipts; that there is now due the complainant from this source, after payment of interest which has accrued upon the mortgage bonds, more than $500,000; that by reason of the defendant's failure to make such payments as they became due the complainant has been unable to create any sinking fund as required by the terms of the first mortgage; that the complainant entered into the contract supposing it had lawful authority to do so, but it has been recently advised by its counsel that it had no such power, and that the lease is null and void, and that it is its duty to repudiate the same and resume possession of its property and franchises; that the complainant is liable to have its charter and corporate rights forfeited by the State of Illinois; that by proper management the income of its property can be largely increased; that the present income is more than sufficient to pay the interest on its bonded indebtedness and create a sinking fund as required by the first-mortgage, and that the first-mortgage is liable to be foreclosed at any time on account of the failure to create such sinking fund.

167 The bill also further avers that, whether the lease be valid or void, an accounting is necessary to determine the amount of money received from the defendant in the operation of the road, which accounting will require the examination of long and complicated accounts, covering a period of 17 years; that the pretended lease is a cloud upon the complainant's title to its property; that the defendant is daily withdrawing from the jurisdiction of this court large sums of money accruing from the operation of the road, which it will continue to do unless restrained by this court or unless a receiver be appointed *pendente lite*.

The prayer is that the lease be declared null and void; that the defendant be required to deliver to the complainant the possession of all property which it now holds under the lease; that the defendant be perpetually enjoined from disturbing the complainant in such possession; that an account be taken of all money received by the defendant or which it might have received by proper management of the property, and that the defendant be required to pay to the complainant the earnings so found to have been received by the defendant as well as the fair value of any property not accounted for, less reasonable disbursements and expenses already stated, and that if the lease shall be held valid an accounting be taken of the amount due under its terms from the defendant, and that the complainant have a decree for the amount so found due.

The defendant demurs to the bill (1) because it discloses no equity, (2) because it is multifarious and contradictory, and (3) because the complainant has a complete remedy at law. Section 1 of an act of the Illinois Legislature, approved February 12, 1855, reads:

"SECTION 1. That all railroad companies incorporated or organized under or which may be incorporated or organized under the authority of the laws of this State shall have power to make such contracts and arrangements with each other and with corporations of other States for leasing or running their roads or any part thereof, and also to contract for and hold in fee simple or otherwise lands or buildings in this or other States for depot purposes, and also to purchase and hold such personal property as shall be necessary and convenient to carry into effect the object of this act."

Section 1 of an act of the General Assembly of the same State, approved February 16, 1865, reads:

"SECTION 1. That it shall not be lawful for any railroad company of Illinois or for the directors of any railroad company of Illinois to consolidate their road with any railroad out of the State of Illinois or to lease their road to any railroad company out of the State of Illinois or to lease any railroad company out of the State of Illinois without having first obtained the written consent of all of the stockholders of said road residing in the State of Illinois, and any contract for such consolidation or lease which may be made without having first obtained said written consent, signed by the resident stockholders in Illinois, shall be null and void."

In 1874 the last-named statute was repealed and the act of 1855 was re-enacted, and on the eighth of February, 1867, an act was passed amending the complainant's charter, section 13 of which reads:

"Said company shall have power to consolidate and connect its railroad with any other continuous line of railroad now constructed or which may be hereafter constructed, either in this State or in the State of Indiana, upon such terms as may be agreed upon between the companies so connecting or uniting; and for that purpose full power is given to such company to make and execute such contract with any other company as will secure the object of said consolidation or connection."

On the twenty-third of February, 1853, the Legislature of Indiana

passed an act (Rev. St., §§ 3971, 3972), the first and second sections of which read:

"SECTION 1. Any railroad company heretofore organized under the general or special laws of this State shall have the power to intersect, join, and unite its railroad with any other railroad constructed or in progress of construction, in this State or any adjoining State, at such point on the State line or at any other point as may be mutually agreed upon by said companies; and such railroad companies are authorized to merge and consolidate the stock of the respective companies, making one joint stock company of the two railroads thus connected, upon such terms as may be by them mutually agreed upon in accordance with the laws of the adjoining State with whose road or roads connections are thus formed, provided their charters authorize said railroad to go to the State line or to such point of intersection.

"SEC. 2. Any railroad company heretofore organized or which may hereafter be organized under the general or special laws of this State for the purpose of constructing a railroad from any point within this State to the boundary line thereof is hereby empowered to extend said railroad into or through any other State or States under such regulations as may be prescribed by the laws of such State or States into or through which said road may be so extended, and the rights and privileges of said company over said extension in the construction and use of said railroad for the benefit of such company and in controlling and applying the assets of such company shall be the same as if its railroad had been constructed wholly within this State."

168 It is claimed that the Illinois statute of 1865 limited the power previously conferred upon railroad corporations of that State to consolidate or enter into leases with railroad companies outside of the State, and that the contract involved in this suit is void because the Illinois company made it without the written consent of the resident stockholders. The act of 1865 was repealed in 1874, when the act of 1855 was re-enacted, and from the last-named date until this suit was brought—13 years—the defendant continued to hold and operate the road in Illinois under the contract, with the complainant's consent. This recognition and performance since the re-enactment of the act of 1855 was enough of itself to conclude the complainant. If, after the repeal of the act of 1865, the contract had been re-executed its validity under the laws of Illinois could not be questioned, and what was done subsequent to 1874 was referable to the contract and the act of 1855. A new agreement made after 1874 would have been no less binding, and, even if the contract was invalid under the act of 1865, it is now too late for the complainant to say that it was made without authority and in violation of that act, but, without reference to the act of 1855 and its re-enactment and the subsequent action of the two companies, we hold that the written consent of all the stockholders residing in Illinois to a lease of an Illinois railroad to a company out of the State was a provision inserted in the act of 1865 for the personal benefit of such stockholders, and one which they could and in this case did waive

by long acquiescence. The silence of the stockholders for almost 20 years was equivalent to their written consent. Any resident stockholder might have enjoined the execution and performance of the contract by a suit brought in due time, but no such suit could be maintained after an acquiescence for the period stated, and no one but a stockholder could object to the contract on that ground. Thomas *v.* Railway Co., 104 Ill'n's, 462; Taylor *v.* Railway Co., 4 Woods, 475; Bucher *v.* Mill Co., 45 Mich., 103; 7 N. W. Rep., 695.

The relief sought by the complainant is inequitable and against the rules which govern courts of conscience, and, if the contract could not be sustained under the Illinois law on any other ground, we would feel authorized to hold that the word "void" in the act of 1865 meant "voidable." Prior to 1865 railroad companies in Illinois were expressly authorized to lease their roads to companies out of the State, and the provision in the act of the last-named date which required the written consent of resident stockholders to give validity to such contracts is no evidence of a change in the previous policy of the State, publicly declared. That the policy of Illinois favored such action by its own railroad corporations abundantly appears from the public statutes and the decision of its courts. The act of 1865 is relied on as establishing a contrary policy. We do not think it does; but if it did, that act was repealed in 1874. If the defendant was not expressly authorized by the Indiana statutes to make the contract it was not in terms prohibited from doing so, and it follows that if the contract is void it is so on the sole ground that its execution by the defendant was impliedly prohibited by the laws of its domicile. We hazard nothing in saying that a judgment of an Indiana court forfeiting the defendant's franchises for no other reason than the making and performing of this contract would startle the bar of that State.

In Branch *v.* Jessup, 106 U. S., 468; 1 Sup. Ct. Rep., 495, the Supreme Court of the United States held that a grant of power to a railroad company to consolidate included the lesser power to sell its road or buy another road, and that the power to construct a railroad included the power to purchase a railroad and pay for the same by an issue of its own stock. The power to consolidate was expressly given to the defendant by the first section of the Indiana act of 1853, and by the thirteenth section of the Illinois act of 1847 the same power was expressly granted to the complainant, and, treating the contract either as a sale or lease, we are unable to see why it was not valid under the ruling in the case just cited. Manufacturing Co. *v.* Bank, 119 U. S., 191; 7 Sup. Ct. Rep., 187; Branch *v.* Atlantic, etc., 3 Woods, 481; Darling *v.* Rogers, 22 Wend., 486.

169 It is urged with earnestness by counsel for the defendant that the second section of the act of 1853 expressly authorized that company to extend its road from the State line into or through the State of Illinois under such regulations as the latter State might prescribe, and that regulations for such extension were prescribed by the Illinois statutes; and, further, that the two roads meeting, as they did, at the line dividing the two States, the defendant was expressly authorized by the Indiana statute to make the contract with the complainant

for the use of its roads in Illinois. But for the decisions of the Supreme Court of the United States in Railroad Co. *v.* Railroad Co., 118 U. S., 630; 7 Sup. Ct. Rep., 24, we might yield to the force of this argument. That was a suit brought by an Illinois railroad company against an Indiana railroad company, and corporations of other States to enforce a lease and for other relief. The Illinois corporation owned a line of railroad extending from the Mississippi river, opposite St. Louis, to Terre Haute, Indiana, 12 miles of the road being in the latter State. By the terms of the lease the Indiana company acquired the right to hold, maintain, and operate for the Illinois company its line of road, equipment, and franchises for a term of 99 years, paying therefor a prescribed annual rental. The Supreme Court of the United States held that the lessor, the Illinois company, was authorized by the Illinois act of 1855 to make the lease; but that the Indiana act of 1853 did not authorize the Indiana company to accept the lease, and it could not, therefore, be enforced against the latter company; that the powers of corporations organized under legislative authority was such and such only as were expressly conferred or plainly implied; that the enumeration of powers granted implied the exclusion of others, and that unless expressly authorized by its charter or aided by some other legislative action, a railroad could not, by lease or any other contract, turn over to another company for a long period of time its road and all its appurtenances, the use of its franchises, and the exercise of its powers, nor could any other railroad company without similar authority make a contract to receive and operate such road, its franchises, and property, and that such a contract was not among the ordinary powers of a railroad company, and was not to be presumed from the ordinary grant of powers in a railroad charter.

If the Indiana act of 1853 did not authorize the Indiana corporation to accept the lease which was involved in that suit, it did not authorize the defendant to bind itself by the instrument now in suit, whether it be a lease "or any other contract," and although Branch *v.* Jessup is not expressly overruled by the case last referred to, and we are not convinced that it was intended to be overruled, we nevertheless feel obliged to hold that the defendant had no power under the Indiana act to make the contract involved in this suit, and that it is void as to the defendant for that reason alone. It does not appear from the bill that by making the contract and operating the road in Illinois the defendant deprived itself of ability to successfully operate its own road in Indiana, or that it neglected any duty that it owed to the latter State or its own stockholders. On the contrary, for anything appearing in the bill, the defendant has been benefited by the contract and its performance. It being settled, then, that the laws of Illinois authorized both corporations to execute the contract and perform it in that State, and that the laws of Indiana conferred no such authority on the defendant, and that the contract is therefore void as to the latter, can this suit be maintained? The invalidity of the contract is not relied on here as a defense to a suit for its enforcement, as was the case in Railroad Co. *v.* Railroad Co., and Thomas *v.* Railroad Co., 101 U. S., 71; and, in-

deed, in most, if not all, of the cases cited in support of the bill.

170 It is urged that if the laws of Illinois authorized the contract and the laws of Indiana did not it is void as to both companies, because they both acted illegally in making it. Is a railroad company entitled to affirmative relief in a court of equity against its own illegal acts, and that, too, without regard to laches? It is well settled that a corporation may plead its own *ultra vires* acts as a defense to a suit on a contract which is against public policy or good morals, or which is prohibited by law, or not authorized by its charter or any other legislative authority; but it does not follow that because such defenses are sustained that a court of equity will annul an illegal contract at the suit of a party to it. Stockholders who act with reasonable promptness may enjoin the execution and performance of illegal agreements and acts, but it is believed that few, if any, well-considered cases can be found in which affirmative relief has been granted to one of the wrong-doers. In Spring Co. *v.* Knowlton, 103 U. S., 49, it was held that a party to an executory contract not *malum in se*, but prohibited by law, might recover back money which he had advanced under it to the other party who had performed no part of the agreement. Assuming that the contract now under consideration is executory, it cannot be said it has not been performed in part by the defendant. It is not claimed that interest on the complainant's outstanding bonds is due and unpaid or that the defendant is insolvent. No complaint is made by the defendant or any stockholder of either corporation against the contract. No such complaint is made by the State of Illinois or the State of Indiana, nor is it seriously believed that either State ever will make such complaint, and yet we are told that because the contract is executory and continuing and was made by both companies—certainly by the defendant—without legislative authority the court must annul it under the rulings in Railroad Co. *v.* Railroad Co. We do not think that the Supreme Court of the United States by that case meant to establish principles for the guidance of courts of equity so widely at variance with its former rulings.

So far as this suit seeks to annul the contract it might have been brought 18 years ago, for the agreement was valid from the beginning, and if it be true that such a suit may be brought at any time before the contract expires by its own terms, laches being no obstacle to relief, the complainant might have delayed for a hundred years more without injury or prejudice to its standing in a court of equity. Equity relieves suitors who are diligent and remits to their legal remedies those who have slept upon their rights, and this is done although the suitor's equitable rights may otherwise be apparently perfect. It is not so in courts of law. There the suitor may wait until the day before his right of action is barred by the statute of limitations. The defense of laches goes to the remedy rather than to the right. In refusing affirmative relief on the ground of negligence a court of equity does not adjudicate against the right asserted in the bill. It simply holds that the complainant is not entitled to

the particular remedy sought. "Nothing," said Lord Camden, in Smith *v.* Clay, Amb., 654, "can call forth this court into activity but conscience, good faith, and reasonable diligence. When these are wanting the court is passive and does nothing. Laches and neglect are always discountenanced." Decisions of the Supreme Court of the United States and other courts need not be cited in support of this doctrine.

By this suit in equity the complainant seeks to recover possession of real estate and quiet its title to the same. Ejectment is a legal and not an equitable remedy, and ejectment will lie to recover the possession of a railroad. Railroad *v.* Johnson, 119 U. S., 608; 7 Sup. C't Rep., 339. The bill cannot be sustained as a bill *quia timet*, the complainant being out of possession and the defendant in possession. Frost *v.* Spitley, 121 U. S., 556; 7 Sup. C't Rep., 1129. The Illinois statute of 1869 (Starr & C. St., 19) authorizes the court to hear bills to quiet title and to remove clouds from the title to land whether improved or occupied or unimproved or unoccupied, and declares that the taking possession of such land after the commencement of suit by the party who claims title adversely shall not affect the complainant's right to relief. This statute does not authorize suit by a party out of possession against a party already in possession under a claim of adverse title as in this case. Hardin *v.* Jordan, 86 Ill., 318; Gage *v.* Abbott, 99 Ill., 366; Kelley *v.* Hurlburt, 100 Ill., 204; Gage *v.* Parker, 103 Ill., 528; Gould *v.* Sternberg, 105 Ill., 488.

171 Finally, is the title multifarious or contradictory? We think it is. It contains two distinct grounds of suit—one for the rescission of the contract, on the theory that it is void, and the other for an accounting and a recovery of earnings, on the theory that it is valid. The averments that relate to the first ground of relief are wholly irrelevant if the bill is considered simply as a bill for an accounting. It is true that a complainant may state the facts of his case and ask relief according to the conclusion of law which the court may draw from them, although this may be presented in two or more alternatives (Story, Eq. Pl., § 42); but this is not such a case. A bill to annul a contract for fraud or illegality and to specifically enforce it if the court shall hold that it is valid is fatally defective, and we can see no substantial difference between such a bill and the one now before us.

Shields *v.* Barrow, 17 How., 130, was a suit to set aside an agreement for fraud, and an amendment to the bill was allowed praying specific performance. In delivering the opinion of the court Justice Curtis said:

"So that the bill thereafter presented not only two aspects, but two diametrically opposite prayers for relief, resting upon necessarily inconsistent cases, the one being that the court would declare the contract rescinded for imposition and other causes and the other that the court would declare it so free from all exception as to be entitled to its aid by a decree for specific performance. * * * A bill may be originally framed with a double aspect or it may be so amended as to be of that character, but the alternative case stated must be the foundation for precisely the same relief."

The demurrer is sustained.

And afterwards, to wit, on the thirty-first day of January, A. D. 1888, came again the complainant, by its solicitors, and filed in the clerk's office of said court its appeal bond herein in the words and figures following, to wit:

172 *Appeal Bond.*

UNITED STATES OF AMERICA, *Southern District of Illinois,* } ss:

In the Circuit Court of the United States for the Southern District of Illinois.

ST. LOUIS, VANDALIA AND TERRE HAUTE RAILROAD COMPANY, Complainant,

vs.

TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY, Defendant.

Bill.

Know all men by these presents that we, The St. Louis, Vandalia and Terre Haute Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, principal, and J. T. Brooks, of Salem, State of Ohio, and Samuel M. Nickerson, of the city of Chicago, county of Cook and State of Illinois, sureties, are held and firmly bound unto the Terre Haute and Indianapolis Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Indiana, and its successors and assigns, in the penal sum of one thousand dollars ($1,000.00), lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves and each of us, our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents.

173 In witness whereof the said St. Louis, Vandalia and Terre Haute Railroad Company has caused these presents to be signed by Thomas D. Messler, its president, and its corporate seal to be hereto attached, and the said J. T. Brooks and Samuel M. Nickerson have hereunto set their hands and seals this twenty-seventh day of January, 1888.

Whereas, in a cause lately pending in the said circuit court of the United States for the southern district of Illinois, on the chancery side thereof, in which the said St. Louis, Vandalia and Terre Haute Railroad Company was complainant and the said Terre Haute and Indianapolis Railroad Company was defendant, a certain decree was lately rendered by said court and entered of record therein on the twenty-fourth (24th) day of January, 1888, decreeing that the demurrer to the amended bill of the said St. Louis, Vandalia and Terre Haute Railroad Company be sustained, and that said amended bill of complaint be dismissed, and that said defendant, The Terre Haute and Indianapolis Railroad Company, have and recover from said St. Louis, Vandalia and Terre Haute Railroad Company its cost in that

behalf sustained; and whereas the said St. Louis, Vandalia
174 and Terre Haute Railroad Company has prayed and been allowed an appeal to the Supreme Court of the United States from said decree of said circuit court of the United States for the southern district of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named St. Louis, Vandalia and Terre Haute Railroad Company shall prosecute its said appeal to effect and shall pay all costs rendered and to be rendered against it in case it shall fail to make good its plea, then the above obligation to be void; otherwise to remain in full force and effect.

[L. S.] ST. LOUIS, VANDALIA AND TERRE HAUTE RAILROAD COMPANY,
By THOS. D. MESSLER, *President.*
Attest: L. B. LIGGETT, *Secretary.*
J. T. BROOKS. [SEAL.]
SAM'L M. NICKERSON. [SEAL.]

Approved Jan'y 31, 1888.

WILLIAM J. ALLEN,
U. S. Dist. Judge.

(Indorsed:) Filed January 31, 1888. James T. Jones, clerk.

175 UNITED STATES OF AMERICA, } ss:
Southern District of Illinois, }

I, James T. Jones, clerk of the circuit court of the United States in and for the southern district of Illinois, do hereby certify that the foregoing is a true and complete copy of all the papers filed and proceedings thereon had in a certain cause wherein the St. Louis, Vandalia and Terre Haute Railroad Company is complainant and the Terre Haute and Indianapolis Railroad Company is defendant, as truly and completely as the same appear of file and record in my office.

In testimony whereof I hereunto set my hand and seal of said court, at Springfield, in said district, this sixth day of March, in the year of our Lord one thousand eight hundred and eighty-eight, and of our Independence the one hundred and twelfth year.

[The Seal of the Circuit Court of the United States for the South'n Dist. Ill.]

JAMES T. JONES, *Clerk.*

176 *Assignment of Errors.*

In the Supreme Court of the United States. In Chancery.

ST. LOUIS, VANDALIA AND TERRE HAUTE RAILROAD COMPANY
vs.
TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY.

Appeal from circuit court of United States for the northern district of Illinois.

The St. Louis, Vandalia and Terre Haute Railroad Company, appellant herein, for assignment of errors, says:

The circuit court erred in sustaining appellee's demurrer to appellant's bill of complaint as amended.

The circuit court erred in dismissing appellant's bill of complaint as amended.

J. T. BROOKS.
TRUMBULL, WILLITS, ROBBINS & TRUMBULL,
McDONALD, BUTLER, AND SNOW,
Solicitors for Appellant,
By JOHN M. BUTLER.

Endorsed on cover: S. Illinois C. C. U. S. No. 1390. The St. Louis, Vandalia and Terre Haute Railroad Company, appellant, *vs.* The Terre Haute and Indianapolis Railroad Company. Filed March 19, 1888.

Office Supreme Court U. S.
FILED,
APR 15 1891
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

NO. 343.

ST. LOUIS, VANDALIA & TERRE HAUTE RAILROAD COMPANY,
APPELLANT,
vs.
TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY,
APPELLEE.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANT.

LYMAN TRUMBULL,
HENRY S. ROBBINS,
PERRY TRUMBULL.
(WITH JOHN M. BUTLER),
OF COUNSEL FOR APPELLANT.

HORACE O'DONOGHUE, BRIEF AND ABSTRACT PRINTER, 192 S. JEFFERSON ST., CHICAGO.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

NO. 343.

ST. LOUIS, VANDALIA & TERRE HAUTE RAILROAD COMPANY,
APPELLANT,
vs.
TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY,
APPELLEE.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANT.

This was a suit in chancery brought by the appellant, a corporation organized under special acts of the Illinois Legislature, against the appellee, a corporation organized under special acts of the Legislature of Indiana. The bill, as originally filed, on July 6th, 1887, sought the cancellation of an instrument in the nature of a lease, by which the appellant's railroad and other property were transferred to the appellee, for the term of 999 years, and the return of such property to the appellant, or if such agreement be adjudged valid, an accounting of moneys due the appellant thereunder. To this bill a demurrer was

interposed by the appellee, alleging want of equity, laches, and that the bill was multifarious and inconsistent. Upon all these grounds the Circuit Court sustained the demurrer. Thereupon the appellant, under leave of court, and for the purpose of avoiding all questions of multifariousness or inconsistency, amended its bill by eliminating therefrom so much of the bill as sought alternative relief, based upon the validity of the contract or lease. To this amended bill defendant again demurred. The Circuit Court sustained the demurrer and dismissed the amended bill, and from this decree complainant perfected the present appeal to this court.

The bill as amended (*Record, p. 38*) avers the incorporation of the complainant under two special acts of the Legislature of Illinois, set out as exhibits to the bill (*Record, pp. 53–55*), for the purpose of operating a railroad from East St. Louis, across the State of Illinois to a point on the Indiana State line near the city of Terre Haute, in Indiana; and after setting out the powers conferred upon the complainant, the bill avers that neither by said acts nor by any laws of the State of Illinois, was complainant authorized to lease its railroad, or by any other contact or conveyance to part with the entire possession, control and use of its property and franchises, or to deprive itself of or invest others with the power and control in the management of its road and other property and in the exercise of its franchises, including its right to impose and collect tolls for the transportation of passengers and freight indefinitely or for any fixed period of time.

The amended bill further avers the incorporation of the defendant by two special acts of the General Assembly of Indiana, made exhibits to the bill (*Record, pp. 64–71*) to construct a railroad from a point on the western

line of the State of Indiana, through the city of Terre Haute to the city of Indianapolis; and further avers that neither by the acts of its incorporation nor by the laws of Indiana was or is the defendant authorized to execute or accept any lease, contract or other conveyance by which the defendant should acquire, either indefinitely or for a fixed term, the ownership, management or control of any railroad located beyond the limits of the State of Indiana.

This bill then alleges that shortly after its incorporation the complainant completed its organization, and on or about the 1st day of July, 1870, had completed its construction of the entire line of road, and equipped the same with the rolling stock and other equipment necessary for its successful and proper operation; that to do this it became necessary for the complainant to, and it did, on the 6th of April, 1867, issue its bonds for the sum of $1,900,000, and secured the same by a first mortgage upon all its property and franchises; that one of the provisions of this mortgage required the complainant, after the 1st day of July, 1872, to set apart and appropriate the sum of $20,000 a year from its earnings as a sinking fund for the payment of the bonds, and provided that upon the failure to do this, or to pay the interest upon the bonds, the mortgage might be foreclosed.

The amended bill further alleges that for the purpose of completing and equipping said railroad, complainant issued, on the 13th of March, 1868, bonds to the amount of $2,600,000, and secured the same by a second mortgage, or trust deed, upon its property. Copies of both these mortgages are made exhibits to the bill (*Record, pp. 72–82*).

The amended bill further states that the bonds covered by both of the mortgages have been sold for a valuable

consideration to, and are outstanding in the hands of, divers persons.

The amended bill then sets out that prior to the completion of complainant's road, and on the 10th day of Feb., 1868, J, F. Alexander, then president of appellant, with the sanction of the then existing complainant's directors, executed with the defendant a pretended lease, in the words and figures following, to wit (*Record, p. 44*):

" WHEREAS, a contract for the construction and equip-
" ment of the St. Louis, Vandalia and Terre Haute Rail-
" road, belonging to a corporation of the State of Illinois,
" has been entered into this day, by which arrangements
" have been made to complete and equip said road between
" East St. Louis and the State line of Indiana in the man-
" ner set forth in said contract;

" AND, WHEREAS, The Terre Haute and Indianapolis
" Railroad Company, a corporation of the State of Indi-
" ana, has proposed to construct, without delay, a first-
" class railroad, being an extension of their present road
" from Terre Haute to the State line of Indiana, upon such
" location as will connect properly and directly with the
" St. Louis, Vandalia and Terre Haute Railroad at the
" State line of Illinois;

" AND, WHEREAS, it is desirable that the said lines,
" when connected, should be operated by the Terre Haute
" and Indianapolis Railroad Company as one road between
" Indianapolis and St. Louis, and the said Terre Haute
" and Indianapolis Railroad Company, having proposed to
" lease and operate the said St. Louis, Vandalia and Terre
" Haute Railroad for a period of nine hundred and ninety-
" nine (999) years; it is therefore agreed, first—

" That upon completion of the road between East

" St. Louis and the State line of Indiana, the Terre Haute " and Indianapolis Railroad Company shall take charge " of and operate the same with its equipment for a period " of nine hundred and ninety-nine (999) years, for which " they shall be allowed sixty-five (65) per cent. of the " gross receipts from all traffic moved over the line, or " business done thereon and from the property of the " company, as a consideration for working and mainte- " nance expenses, the remaining thirty-five (35) per cent. " to be appropriated as follows:

" *First*—To the payment of interest on the first and " second mortgage bonds of the St. Louis, Vandalia and " Terre Haute Railroad Company according to their legal " priority.

" *Second*—All the surplus of said thirty-five (35) per " cent. to be paid over to the St. Louis, Vandalia & Terre " Haute Railroad Company (semi-annually), to be disposed " of by it for the benefit of its stockholders.

" If the thirty-five (35) per cent. should, from any " cause, not be sufficient in amount to protect the interest " on mortgage bonds and sinking funds therefor, as they " mature from time to time, together with the payment of " taxes and proper cost of maintaining organization, so " that the rights of stockholders may be preserved, then, " and in that event, the lessee shall advance for the com- " pany whatever amounts may be needed, to be accounted " for under the yearly averages of this lease during the " contract.

" It is further agreed that the Terre Haute and In- " dianapolis Railroad Company, as lessee, shall enjoy all " the rights, powers and privileges of the St. Louis, Vandalia " & Terre Haute Railroad Company, so far as the same

" may be needful to maintain and operate said railroad;
" also to impose and collect tolls and rates for transporta-
" tion, and to do all other acts and things as fully and as
" effectually as the said St. Louis, Vandalia and Terre
" Haute Railroad Company could do if operating said line,
" it being always understood and agreed that the gross
" proceeds from through or joint traffic or business shall
" be divided on the *pro rata* basis per mile for distances
" moved on the roads of each party.

" In witness whereof the parties, respectively, have
" hereunto affixed, this the tenth (10th) day of February,
" A. D. 1868, their official signatures and seals under the
" authority of their boards of directors.

[Seal St. L., V. & T. H. R. R. Co.]

"THE ST. LOUIS, VANDALIA AND TERRE HAUTE RAIL-
" ROAD COMPANY,

" By J. F. ALEXANDER, *President.*

[Seal T. H. & I. R. R. Co.]

" THE TERRE HAUTE AND INDIANAPOLIS RAILROAD
" COMPANY,

" By W. R. MCKEEN, *President.*"

The amended bill also avers that on the 12th of January, 1869, the then board of directors of complainant undertook to authorize its president to change the terms of the above lease, by passing the following resolution (*Record, p. 90*), to which the defendant also assented and agreed:

" WHEREAS, at the time of the execution of the lease
" of the St. Louis, Vandalia and Terre Haute railroad to
" the Terre Haute and Indianapolis Railroad Company,
" to wit:

" On the tenth day of February, 1868, it was agreed
" and understood that the amount to be allowed to the

" last-named company for operating the said road should " be seventy (70) per cent. of the gross receipts instead of " sixty-five (65) per cent., as it now stands in said lease; " therefore,

" *Resolved*, That the president be, and he is hereby, " authorized to change the terms of said lease so that when " the said sixty-five (65) per cent. occurs therein, it shall " read seventy (70) per cent., and that the said Terre Haute " and Indianapolis Railroad Company shall be allowed " seventy (70) per cent. of the gross receipts from all " traffic moved over the line of said road or business done " thereon, in the same manner as if it were so provided in " the said original lease, but if the working and maintenance " expenses of said road shall be less than seventy (70) per " cent. of the gross receipts aforesaid, then all of such " excess shall be paid over to the St. Louis, Vandalia and " Terre Haute Railroad Company."

The amended bill then avers that at the time of the execution of the above pretended lease, the following statute, passed by the Illinois Legislature on Feb. 16, 1865, was in force:

" Be it enacted by the people of the State of Illinois, " represented in the General Assembly, That it shall not " be lawful for any railroad company of Illinois, or for " the directors of any railroad company of Illinois, to con- " solidate their road with any railroad out of the State of " Illinois, or to lease their road to any railroad company " out of the State of Illinois, or to lease any railroad out " of the State of Illinois, without having first obtained the " written consent of all of the stockholders of said roads " residing in the State of Illinois, and any contract for " such consolidation or lease which may be made, without " having first obtained said written consent, signed by the

"resident stockholders in Illinois, shall be null and void; "Provided, That it shall be lawful for the directors of any "railroad company, created by the laws of this State, to "contract for the use and operation of any railroad connecting with their line beyond the limits of the State, and in "all contracts for the use and operation of any railroad by another corporation it shall be lawful for the "parties to provide for the use of any of the powers and "privileges of either or both of the corporations parties "thereto; and, provided further, that nothing in this act "shall be so construed as to authorize the consolidation of "any of said railroads with railroads out of the State of "Illinois; provided, that nothing contained in the first "proviso to this act shall in anywise apply to or be taken "advantage of by the Great Western Railroad Company "(of 1859), a corporation of the State of Illinois." (*Record, p. 91.*)

The bill then gives the names of fifty-nine persons, who, at the time of the execution of the said pretended lease, were stockholders of the complainant and residents of Illinois, who neither then nor at any subsequent time consented in writing to the execution thereof, and avers that at no stockholders' meeting, held then or subsequently, was the execution of said lease authorized, confirmed or ratified.

The bill then avers that, as soon as complainant's road was built and equipped, and about the 1st day of July, 1870, the defendant claiming the right to do so under said pretended lease, took complete possession and control of complainant's railroad, equipment and appurtenances, and all other property of every kind, and has, from that time continuously to the present time, retained the exclusive possession and control thereof, and has since been

continuously, and now is, exercising all the rights, powers and privileges of complainant under its franchises, including the operation and management of said railroad and property and the imposing and collecting of tolls and rates accruing from the transportation of passengers and freight over complainant's road, and that the sums so received by defendant and appropriated to its own use, and that of its stockholders, from complainant's said property, franchises, etc., now aggregate more than $21,600,000.

The bill then avers that the complainant is advised by counsel that defendant in executing and accepting said pretended lease and taking possession and operating thereunder, said railroad and other property rights, etc., exceeded the powers and rights conferred upon the defendant by its charter and the laws of Indiana, and that neither complainant nor its president, nor its then board of directors, had any power to execute such a lease of its property, or make any contract whereby it could, for a term of years or indefinitely, part with the complete possession and control of its property and franchises, or transfer to the defendant or any other corporation its property or franchises, or its right to impose or collect tolls for transportation, and that said pretended lease for 999 years was an attempt on the part of complainant to divest itself of the entire possession and control of its property and franchises for such an extended period of time as virtually amounts to a sale in perpetuity and a practical surrender of its property and entire franchises to a foreign corporation, whereby complainant is incapacitated from fulfilling those duties and obligations to the State imposed upon it by the acceptance of its charter, which neither complainant or its officers or directors could lawfully do, and that if this could be lawfully done, the pretended lease was not executed in the

manner in which alone such a lease could be executed under the laws of Illinois, and for this reason such lease was absolutely null and void.

The bill then avers that defendant by taking possession of complainant's railroad and property, became in equity, the trustee of complainant, and, as such, is liable to account to it for said property, and all the tolls, emoluments and receipts which defendant had, or ought to have received from the possession, control, operation and management of complainant's railroad, and became liable to restore all the said property now in defendant's possession, to complainant, and to pay complainant the fair value of so much of said property as defendant no longer has it in its control, and to pay complainant the receipts thereof, after deducting the defendant's reasonable disbursements in the care, management and operation of complainant's railroad and property.

The bill then avers a demand by plaintiff upon defendant to turn over said property; that defendant refused and still refuses to do so, and insists upon the validity of said pretended lease and its right, during the entire period of 999 years, to retain possession of said property and enjoy all the rights, powers and privileges under complainant's franchise, so far as needful to maintain and operate said railroad; and avers that complainant having no other source of revenue has been unable to apply any money to the creation of a sinking fund as required by its first mortgage aforesaid.

The bill then avers that the officers of complainant, when they executed said pretended lease, supposed they had the power to do so, and that complainant did not know until recently, that said lease was null and void, and its said officers and directors had violated the laws and had

exceeded its powers in executing the same, and for this reason complainant had not previously instituted proceedings for the purpose herein sought, but that it has been recently advised by its counsel of the invalidity of said pretended lease, and that it is complainant's duty at once to repudiate the same and demand possession and control of its property and franchises, and thereby at once place itself in a position to perform and discharge its duties and obligations to the public.

The bill then avers that great and irreparable injury will be done complainant and its stockholders, unless complainant is immediately restored to the possession of its property and franchises; that it is advised by its counsel that by the execution of said pretended lease it has rendered itself liable to a forfeiture of its charter; that its railroad and other property exceeds in value $8,500,000, and yields a large annual income, which, under a careful and prudent management could be largely increased; and that the net income is now more than sufficient to pay the interest upon its bonded indebtedness and comply with the requirements of its first mortgage concerning the creation of a sinking fund; that by reason of its failure to provide for such sinking fund the first mortgage bondholders may at any time institute proceedings to foreclose and thereby throw the affairs of complainant into great confusion and render it insolvent.

The bill then avers that it is advised by counsel that if defendant is permitted to remain in possession and control of said railroad and appurtenances and receive the earnings thereof under said pretended lease, complainant will have no means of enforcing the provisions of the same against the defendant, and that to allow defendant to avail itself of said pretended lease when the same cannot be

enforced against it, will result in irreparable injury to complainant.

The bill then avers that the protection and enforcement of complainant's rights to the premises require the taking of an account of the moneys received by the defendant in the operation of said railroad, etc., which will require the investigation of long and complicated accounts covering a period of nearly seventeen years, the expenditure and receipt of large sums of money and involve a great many separate items and accounts; that complainant is entitled also to an account by said defendant of said property so taken by it under said lease, and that the court of law furnishes no adequate means of the taking of such accounts; that said pretended lease, while outstanding and claimed by the defendant to be valid, is, and unless delivered up and canceled, will continue to be, a cloud upon complainant's title to said property, during the entire period covered by said pretended lease, and such cloud is liable to seriously embarrass complainant in the ownership and use of said property; that defendant is a non-resident of the district and State, and has no propterty therein from which satisfaction of any degree or judgment obtained in this court by compainant could be made; that large sums of money are daily being received by defendant from tolls and charges in the operation of complainant's road, and are being withdrawn by defendant from the jurisdiction of this court; and that defendant will continue during the litigation to collect and appropriate to its own use and withdraw from the jurisdiction of this court such large emoluments and tolls to the great and irreparable injury of complainant, unless the possession of said railroad and other property shall be restored to complainant, and defendant be restrained from

further interfering therewith, or a receiver be appointed to take possession and operate said railroad *pendente lite*. The prayer of the bill is (*Record, p. 51*):

1. For the cancellation and surrender of said pretended lease.

2. For the return to complainant by defendant of the property received under said pretended lease, or so much thereof as is still in defendant's possession, and for a perpetual injunction restraining defendant from further interference with complainant in its possession, control and operation of said railroad and other property.

3. For an accounting of the amounts, which defendant has, or might have, received by due diligence from the use, operation and management of said railroad and other property, during its possession thereof; and that an account may be also taken of the reasonable expenses and disbursements necessarily incurred by defendant in operating and maintaining said road and other property, and for a decree that defendant pay complainant the amount so received by it, together with the fair value of such of said property, if any, as was not in possession of defendant at the time of the filing of the bill, less defendant's said reasonable disbursements and expenses.

5. For a temporary injunction restraining defendant from interfering in the management of said railroad *pendente lite*, or for a receiver *pendente lite*.

6. For general relief.

"Exhibit A" to the bill (*Record, p. 53*) is the original act of February 10th, 1865, incorporating the complainant. So much thereof as is pertinent to the present suit, reads as follows:

" An act to incorporate the St. Louis, Vandalia and " Terre Haute Railroad Company.

Section 1. Be it enacted by the people of the State of " Illinois, represented in the General Assembly, that Henry " Wing, * * * * and such other persons as may " associate with them for the purposes of this act, are here- " by constituted a body corporate and politic, by the name " and style of ' The St. Louis, Vandalia and Terre Haute " Railroad Company,' with perpetual succession, and by " that name and style shall be capable in law of taking, " purchasing, and holding, leasing, selling and conveying " estate and other property, whether real, personal or " mixed, so far as the same may be necessary for the pur- " poses hereinafter mentioned, and in their corporate name " may sue and be sued, have a common seal, and may have " and exercise all powers, rights, privileges and immunities " which are or may be necessary to carry into effect the " purposes and objects of this act as the same are herein " set forth.

" Section 2. The said railroad company shall have full " power and authority to locate, construct, furnish and " maintain a railroad, with one or more tracks, commenc- " ing on the left bank of the Mississippi river, opposite " St. Louis, running thence eastwardly through Green- " ville, the county seat of Bond County, and through " Vandalia, by the most eligible route, to a point on the " River Wabash, which they may deem the most con- " venient for extending the same to Terre Haute, in " Indiana; and for this purpose are authorized to lay out " their said road in width not exceeding one hundred and " fifty feet through its whole length, and, for the purpose " of cuttings, embankments, and all necessary uses, may

"take as much more land as may be needed for the con-
"struction and security of said railroad.

"Section 9. The said company shall have all the
"rights, privileges, powers and immunities which are
"commonly given to or exercised and enjoyed by railroad
"companies in this State, whether the same be directly
"expressed in this act or not.

"Section 11. This act shall be deemed a public act,
"and be in force from and after its passage."

"Exhibit B" to the bill (*Record, p. 55*) is the act amending the original act incorporating complainant. So much of it as is pertinent to the present suit is as follows:

Sections 2 and 3 provide for the manner of the exercise by complainant of the right of eminent domain. Sections 4, 5, 6, 7 and 8 provide for the manner in which municipal corporations along the line of the road may aid the construction thereof by subscriptions to its stock.

Sec. 11 provides that the company "may fix, estab-
"lish, take, and receive such rates of toll for all passengers
"and property conveyed or transported upon the same as
"the directors shall from time to time establish, and shall
"carry and transport the mails of the United States on
"such terms as may be agreed upon."

"Sec. 13. Said company shall have power to consol-
"idate and connect its railroad with any other continuous
"line of railroad now constructed or which may be here-
"after constructed, either in this State or in the State of
"Indiana, upon such terms as may be agreed upon between
"the companies so connecting or uniting, and for that
"purpose full power is hereby given to said company to
"make and execute such contracts with any other company

" as will secure the object of said consolidation or connec-
" tion."

Sec. 14 confers upon complainant power to borrow money and to mortgage its property to secure the repayment thereof.

" Sec. 21. The corporate rights, privileges, and fran-
" chises of said company, as granted, are hereby declared
" to be in full force and effect, and shall be liberally con-
" strued for all the purposes sought to be obtained."

" Exhibit C " to the bill (*Record, p. 64*) is the act incorporating the defendant under the name of Terre Haute and Richmond Railroad Company. Such act, so far as pertinent to this suit is as follows:

" An act to incorporate the Terre Haute and Rich-
" mond Railroad Company, approved January 26, 1847.

" Section 1. Be it enacted by the General Assembly
" of the State of Indiana, that Chauncey Rose" (and others), " and their successors in office, duly elected as
" hereinafter provided, are hereby constituted a body
" corporate and politic by the name of 'the president and
" directors of the Terre Haute and Richmond Railroad
" Company,' and by such name shall be capable to sue
" and be sued, plead and be impleaded, answer and be
" answered unto, either in law or equity, in any court of
" competent jurisdiction within this State; and shall have
" power to make and use a common seal, and the same to
" alter at pleasure, and to make contracts and enforce the
" same, and to establish and put in force such by-laws,
" rules, and regulations as may be necessary to carry into
" effect the provisions of this act not inconsistent with the
" Constitution and laws of this State and of the United
" States.

"Sec. 12. The corporation, by their agents, shall "have full power from time to time to examine, survey, "locate and construct a railroad, of a single or double "track, commencing at some point on the western line of "the State of Indiana and running, on the best ground for "the interest of the company and the public convenience, "eastwardly through Terre Haute, in the County of Vigo; "Greencastle, in the County of Putnam; and Indianapolis, "in the County of Marion, to Richmond, in the County of "Wayne."

Secs. 15 and 16 provide for the exercise of the right of eminent domain.

"Sec. 29. The corporation may, by contract, admit "the intersection with said road with any other railroad, "turnpike, or any other road or collateral road."

"Exhibit D" to the bill (*Record, p. 71*) is an act approved March 6, 1865, amendatory of the next preceding act, by which the name of the defendant is changed to the Terre Haute and Indianapolis Railroad, further time is given for a completion of a portion of the line, and the eastern terminus thereof is made Indianapolis instead of Richmond.

The defendant's demurrer to this amended bill (*Record, p. 92*) was upon the grounds: 1. Want of equity; 2. Complete remedy at law; 3. Laches.

The Circuit Court sustained the demurrer upon all the grounds stated, without, however, filing any additional opinion; the opinion in the record (p. 94) having been rendered in deciding the demurrer to the original bill, and the amended bill presenting the same questions of the original bill, except that of multifariousness and inconsistencies.

The errors assigned are that the Circuit Court erred in sustaining the demurrer to the amended bill and in dismissing said bill.

POINTS OF APPELLANT.

1. The execution of the lease by the appellee was *ultra vires*, and for this reason, void.

Pennsylvania Company v. *St. Louis, Alton, etc.*, 118 U. S. 290.

Oregon Railway Company v. *Oregonian Railway*, 130 U. S. 1.

The Board, etc., Tippecanoe Co., et al. v. *Lafayette, etc., R. R.*, 50 Ind. 85.

Bank v. *Earle*, 13 Peters, 518.

Canada Southern R. R. Co. v. *Gebhard*, 109 U. S. 537.

Starkweather v. *Am. Bible Society*, 72 Ill. 50.

St. Clara Female Academy v. *Sullivan*, 116 Ill. 375.

Thompson v. *Waters*, 25 Mich. 214.

Diamond Match Co. v. *Powers*, 51 Mich. 145.

2 Starr & Curtis Annotated Statutes (Ill.), chap. 114, par. 43.

R. S. Ind. (1881) secs. 3967, 3970.

2. The appellant could not, by its charter, yield up the control of its road, as attempted by this lease, and it is for this reason void.

3 Priv. Laws, Ill. 316.

R. R. Co. v. *Vance*, 96 U. S. 453.

3 Starr & Curtis (Ill.) Statutes, 447.

Town of Eagle v. *Kohn*, 84 Ill. 292.

Richeson v. *People*, 115 Ill. 460.

F. L. & T. Co. v. *St. J. & Denver R. R. Co.*, 1 McCrary, 247.
Archer v. *R. R. Co.*, 102 Ill. 493.
The Great Northern Ry. Co. v. *The Eastern Ry. Co.*, 9 Hare, 308, 312.
Thomas v. *R. R. Co.*, 101 U. S. 71, 72, 78.
Penn. R. R. Co. v. *St. L., A. & T. H. R. R. Co.*, 118 U. S. 290.
O. & M. R. R. Co. v. *I. & C. R. R. Co.*, 5 Am. Law Reg. (N. S.), 737, 738.
Stephens v. *Pratt*, 101 Ill. 231.
Carroll v. *Carroll*, 16 Howard, 275.
Foxcraft v. *Mallet*, 4 Howard, 353.
Thomas v. *Hatch*, 3 Sumner, 170.
Williamson v. *Berry*, 8 How. 495, 543.
Hyman v. *Bayne*, 83 Ill. 256.
Lauriat v. *Stratton*, 6 Sawyer, 339.
Pease v. *Peck*, 18 Howard, 595.

3. The lease being *ultra vires* and void, it could not be made valid by any lapse of time, acquiescence or ratification by the parties.

York, etc., R. R. Co. v. *Winans*, 17 Howard, 39.
Black v. *Canal Co.*, 22 N. J. Eq. 399.
Thomas v. *Railroad*, 101 U. S. 71.
Penn. Company v. *St. Louis, Alton & Terre Haute R. R. Co.*, 118 U. S. (*supra*).
Oregon Ry., etc., Company v. *Oregonian Ry.*, 130 U. S. 1.
New Castle Northern Ry. Co. v. *Simpson*, 21 Fed. Rep. 533.

Board of Commissioners, Tippecanoe Co. v. *L. B. & N. R. R.*, 50 Ind., *supra*.

O. & M. R. R. Co. v. *I. & C. R. R. Co.*, American Law Register, vol 5, new series, 739.

4. The lease being void, it was the right as well as the duty of complainant to recover its property, and thus place itself again in a position to discharge its public duties.

Thomas v. *Railroad*, 101 U. S. 71.

Story's Eq. Jur., sec. 298.

Pomeroy's Eq. Jurisprudence, sec. 941.

Debenham v. *Ox*, 1 Vesey, Sr. 276.

Smith v. *Bruning*, 2 Vernon's Reports, 392.

Drury v. *Hooke*, 1 Vernon, 411.

Lord St. John v. *Lady St. John*, 11 Vesey, Jr. 526.

O'Conner v. *Ward*, 60 Miss. 1026.

Morris v. *McCulloch*, 1 Ambler Ch. 432.

New Castle R. R. v. *Simpson*, 21 Fed. Rep. 533.

Atlantic & Pacific Telegraph Co. v. *Union Pacific R. R. Co.*, 1 Fed. Rep. 745

Western Union Telegraph Co. v. *St. Joseph & Western R. R. Co.*, 3 Fed. Rep. 430.

5. This bill makes a case for chancery jurisdiction, and appellant is not obliged to resort to a court of law.

Constitution of Illinois, 1870, art. 11, sec. 10.

R. R. v. *Johnson*, 119 U. S. 608.

Pomeroy's Eq. Jur., sec. 941.

Story's Eq. Jur., sec. 298.

Debenham v. *Ox*, 1 Vesey, Sr. 276.

Drury v. *Hooke*, 1 Vernon, 411.

Lord St. John v. *Lady St. John*, 11 Vesey, 526.

Smith v. *Runing*, 2 Vernon, 392.

Morris v. *McCulloch*, 1 Amb. Ch. 432.

New Castle Northern R. R. Co. v. *Simpson*, 21 Fed. Rep. supra.

Telegraph Co. v. *Union Pacific R. R. Co.*, 1 Fed. Rep. 745.

Western Union Telegraph Co. v. *St. Joseph & Western R. R. Co.*, 3 Fed. Rep. 430.

Railway Co. v. *Keokuk Bridge Co.*, 131 U. S. 389.

Parkersburg v. *Brown*, 106 U. S. 487.

New Castle Ry. v. *Simpson*, 23 Fed. Rep. 214.

Green's Brice's Ultra Vires, 717.

Western Union Telegraph Co. v. *U. P. Ry. Co.*, 1 McCrary, 558 (3 Fed. Rep. 423).

A. & P. Tel. Co. v. *U. P. Ry. Co.*, 1 Fed. Rep. 745 (1 McCrary, 549).

Farmer's Loan & Trust Co. v. *St. Joseph & Denver City R. R. Co.*, 2 Fed. Rep. 117 (1 McCrary, 247).

Spring Co. v. *Knowlton*, 103 U. S. 49.

White v. *Franklin Bank*, 22 Pick. 181.

Day v. *Spiral Springs Buggy Co.*, 57 Mich. 146.

Foulke v. *San Diego R. R.*, 51 Cal. 365.

Harriman v. *First Baptist Church*, 63 Ga. 186.

Davis v. *Old Colony R. R.*, 131 Mass. 258.

Hardy v. *Metropolitan Land Co.*, L. R. 7 Ch. Appeals, 427.

Ernest v. *Croysdill*, 2 De G. F. & J. 197.

Bryson v. *Warwick Canal Co.*, 4 De G. M. & G. 731.

Salomons v. *Llaing*, 12 Beav. 382.

6. The right to maintain this suit is not barred by laches.

Thomas v. *Railroad, supra.*

Kent v. *Quicksilver Mining Co.*, 78 N. Y. 183.

City of Alton v. *Ill. Transportation Co.*, 12 Ill. 38.

Brown v. *County*, 95 U. S. 157.

Rev. Statutes of Ill., 1874, ch. 83, sec. 1.

Medley v. *Elliott*, 62 Ill 532.

ARGUMENT.

I.

The question arising under this first point has been conclusively settled in favor of appellant by the case of

Pennsylvania Company v. *St. Louis, Alton, &c.*, 118 U. S. p. 290.

In that case, as in the one at bar, an Illinois railroad had attempted to lease itself to a railroad company, organized under the laws of Indiana, the term in the former case being ninety-nine years, and in the case at bar 999 years. This court in that case, after a full review of its former decisions and the authorities, thus stated the law:

"We think it may be stated, as the just result of these "cases and on sound principle, that unless specially au- "thorized by its charter, or aided by some other legislative "action, a railroad company cannot, by lease or any other "contract, turn over to another company, for a long period "of time, its road and all its appurtenances, the use of its

" franchises, and the exercise of its powers, nor can any " other railroad company without similar authority make " a contract to receive and operate such road, franchises, " and property of the first corporation, and that such a " contract is not among the ordinary powers of a railroad " company, and is not to be presumed from the usual grant " of powers in a railroad charter."

This court then considered the powers of the charter of the Indiana corporation. That company, like the appellee here, had nothing in its special act of incorporation, which could be relied upon as conferring the power to execute a contract similar to the lease in either case. But such power was claimed there (and is claimed here) to arise from certain general statutes of Indiana. All those acts, including those referred to in the opinion of the learned circuit judge in this case, were fully considered by this court, and again reconsidered in the rehearing of that case (118 U. S. p. 630); and this court then decided that, by the law of Indiana, the Indiana railroad company had no power to accept the contract or lease in that case, and it was for this reason void as against that company. The principle established by this case was reaffirmed by this court in

Oregon Railway Company v. *Oregonian Railway*, 130 U. S. 1.

The proposition contended for, under this point, is then as well settled by the decisions of this court as anything can well be, if the contract or lease here in controversy is, in its substantial and objectionable features, similar to the one in the Alton case.

That they are alike will appear from a comparison of the two contracts. In the Alton contract (Article 1) it was

provided that the Indiana Railroad Company, lessee, " shall, " will and may manage, operate and carry on business of " a certain railroad belonging to " the Illinois corporation (lessor), for the period of ninety-nine years; and by Article 5 the lessee company was authorized to fix all rates of fare; and by Article 6 it was provided that the Indiana corporation, lessee, " shall, and may at all times during the " period of ninety-nine years aforesaid, demand, collect " and receive any and all fares, charges, freights, tolls, rents, " revenues, issues and profits of " the line of railroad belonging to the Illinois corporation, lessor. By the contract in the case at bar, the control of the Illinois railroad was surrendered to the Indiana corporation, by the following language:

" And, whereas, it is desirable that the said lines, " when connected, should be operated by the Terre Haute " and Indianapolis Railroad Company, as one road, be- " tween Indianapolis and St. Louis. * * * * " It is agreed, first:

" That, upon completion of the road between East " St. Louis and the State line of Indiana, the Terre Haute " and Indianapolis Railroad Company shall take charge of " and operate the same, with its equipment, for a period " of nine hundred and ninety-nine (999) years.

* * * * * * * * * *

" It is further agreed that the Terre Haute and Indian- " apolis Railroad Company, as lessee, shall *enjoy all the* " *rights, powers and privileges of the St. Louis, Vandalia* " *& Terre Haute Railroad Company, so far as the same* " *may be needful to maintain and operate said railroad;* " also to impose and collect tolls and rates for transporta- " tion, and to do all other acts and things as fully and as " effectually as the said St. Louis, Vandalia and Terre

" Haute Railroad Company could do if operating said " line."

The only substantial difference between the two contracts (aside from the difference in the lengths of the two terms) is this: While both contracts provide for the payment by the lessee of a certain percentage of the gross profits, the *Alton* contract contains a guaranty that such percentage of receipts shall not annually be less than $450,000; whereas, the lease in the case at bar, as modified by the resolution of Jan. 12, 1869 (*Record, p. 90*), contemplates the payment by the lessee to appellant of 30 per cent. of the gross earnings, and as much more as the cost of working and maintaining said road should be less than 70 per cent., that is, the appellee guarantees that the net earnings will be at least 30 per cent. of its gross earnings. But the amount of rent to be paid, or the extent of the pecuniary benefit to be derived by the lessee therefrom; and whether this is fixed by definite figures or is to be received by the indirect benefits to accrue to the lessee's own road from its operation in conjunction with the leased road, constitutes no essential difference between these contracts, and is not a material consideration in determining their validity. The contract in each case is invalid, because a corporation organized by the laws of Indiana to construct and operate a railroad only in Indiana, has attempted to take upon itself the entire operation and control of a railroad (and the exercise of all the rights and franchises incident thereto) in the State of Illinois. The contract in the case at bar does this as effectually as does the contract in the *Alton* case. Indeed, the former is more objectionable, because it covers a much longer term than ninety-nine years. The illegal consequences resulting from either of the contracts are as great whether

the rental fixed be a certain one, or one liable to fluctuation; whether, in a financial sense, in the particular contract, the lessee or the lessor has got the best of the bargain. There can be no substantial distinction between the contract at bar and the *Alton* contract, as was conceded by the learned circuit judge, who, after reviewing the Alton case, *supra*, says in his opinion (*Record, p. 100*): "If the Indiana act of 1853 did not authorize the Indiana "corporation to accept the lease which was involved in "that suit, it did not authorize the defendant to bind "itself by the instrument now in suit, whether it be a "lease or any other contract, and * * * we "* * feel obliged to hold that the defendant had "no power under the Indiana act to make the contract "involved in this suit, and that it is void, as to the defend "ant, for that reason alone."

It is true that the learned circuit judge, in reaching this conclusion, thinks that it is at variance with the decision of this court in *Branch* v. *Jesup*, 106 U. S. 469, and that that case is inconsistent with the *Alton* case in 118 U. S.; and he is not convinced that this court, by the latter case, intended to overrule the doctrine of *Branch* v. *Jesup*. But is there that inconsistency? It seems to us that there is not. The position of the learned circuit judge is that, in *Branch* v. *Jesup*, this court has decided that a grant of power to a railroad company to "incorporate its stock with the stock of any other company" included the lesser power to *sell* its road to another company; and, as the Indiana act of Feb. 23, 1853, conferred upon the appellee a similar right to consolidate (the appellant, by the laws of Illinois, being also allowed to consolidate), that under *Branch* v. *Jesup* this conferred upon the appellee the power to accept the lease in controversy. But *Branch*

v. *Jesup* is not inconsistent with the *Alton* case, because in the former case this court was construing a Georgia statute, and, in the latter, it was construing an Indiana statute, which had received a different construction from the Supreme Court of that State, which construction this court would feel itself obliged to accept. We refer to the case of

The Board, etc., Tippecanoe Co. et al. v. *Lafayette, etc., R. R.*, 50 Ind. 85.

In that case one railroad company of Indiana had leased itself to another railroad company for the term of ninety-nine years, with a right of renewal at the pleasure of the lessee, and in support of the validity of that agreement counsel referred to the same Indiana statute of Feb. 23, 1853, cited by the learned circuit judge as conferring the right of consolidation, and urged that a "consolidation is nothing more or less than a perpetual lease." • • • "A lease for a specified number of years is but in effect a modified or base form of consolidation" (p. 103). But the court held (p. 110) that the act referred to did not authorize the execution of the contract in controversy, whether it be called a lease or sale, and adjudged the instrument void, because *ultra vires*. Under this decision of the Indiana court holding that the statute of that State permitting consolidation did not authorize a railroad company to sell or lease its road, this court, in the *Alton* case, could not have applied the *Branch* v. *Jesup* case (as construed by the learned circuit judge) to that case, nor can it be applied to the case at bar.

Again, when the language of the court in *Branch* v. *Jesup* is limited to the facts of that case, it is not thought that it has the scope which it is given it by the learned

circuit judge. In that case the law conferred upon a certain railroad the power to "incorporate its stock with "the stock of any other company, on such terms as might "be mutually agreed upon." With the concurrence of apparently all the stockholders of this company its road was transferred to another company, upon the stockholders of the selling company receiving stock in the purchasing company, which latter had unissued stock or the power to issue further stock, and this court in that case held such transaction not to be *ultra vires* of the selling company. The statute provided that its stock might be incorporated with the stock of another company without apparently pointing out how it should be done. The usual way, however, of doing this (and perhaps the only way when the stock of the two companies has been fully issued) is by incorporating a new company or amalgamating the two old companies into a new company composed of the stockholders of both In that case, however, instead of adopting this plan, as the buying company had the power to issue further stock, its organization was retained and further stock was issued by it to the stockholders of the selling company. This was a practical consolidation. The stockholders of two companies became by it, as in the other case, stockholders of one company. The only difference is that in one case a new company is the result; in the other, one of the old companies continues in existence with an increased stock. But this is a difference of form and not of substance; and this court in the opinion of that case refers to an act of the Georgia Legislature, giving another railroad company the right to increase its stock for the purpose of carrying out a similar arrangement, and thus, in the opinion of the court, recognizing

the validity of this method of exercising the charter powers.

A further distinction between the case at bar and the *Alton* case is attempted by counsel for appellee. It is this: Conceding that under that case the defendant here, under its Indiana charter and the laws of Indiana, had no power to take a lease of an Illinois railroad, still the State of Illinois *could* so *enlarge* the scope of the Indiana charter as to authorize it to accept the lease of an Illinois road, and that Illinois *has*, through its Legislature, done this. This involves the proposition that the scope of the charter of this Indiana corporation, when acting within the State of Illinois, is to be determined, not by the terms of its charter or the laws of Indiana, but by the laws of Illinois. A corporation exercises no powers in a foreign state, except by comity. If permitted by the comity of a foreign state to enter its limits to transact business, it must, doubtless, do so subject to any *restrictions* that state may place upon it, and such foreign state may thus, doubtless, *limit* the charter powers of such corporation, as respects its acts in such foreign state. When no such restrictions or limits are imposed, it is believed that the law is well settled that the charter of the state of its creation furnishes the measure of its powers in such foreign state. In

Bank v. *Earle*, 13 Peters, 518,

The question was whether a banking corporation of one State, which was authorized by its charter to buy exchange, could purchase bills in another State. Chief Justice TANEY said: " It may be safely assumed that a cor-
" poration can make no contracts, or do no acts either within
" or without the State which creates it, except such as
" are authorized by its charter;"

* * * "The corporation must no doubt show that "the law of its creation gave it authority to make such con- "tracts, through such agents."

In *Canada Southern R. R. Co.* v. *Gebhard*, 109 U. S. 537, Chief Justice WAITE said: "A corporation must "dwell in the place of its creation, and cannot migrate to "another sovereignty (*Bank of Augusta* v. *Earle*, 13 Pet. "588), though it may do business in all places where its "charter allows and the local laws do not forbid. *Rail-* "*road* v. *Koontz*, 104 U. S. 12. But wherever it goes for "business it carries its charter, as that is the law "of its existence (*Relf* v. *Rundel*, 103 U. S. 226), "and the charter is the same abroad that it is at "home. Whatever disabilities are placed upon the cor- "poration at home it retains abroad, and whatever legis- "lative control it is subjected to at home must be recog- "nized and submitted to by those who deal with it "elsewhere. A corporation of one country may be "excluded from business in another country (*Paul* v. *Vir-* "*ginia*, 8 Wall. 168), but, if admitted, it must, in the "absence of legislation equivalent to making it a corpora- "tion of the latter country, be taken, both by the govern- "ment and those who deal with it, as a creature of the "law of its own country, and subject to all the legislative "control and direction that may be properly exercised "over it at the place of its creation."

The law in Illinois has been settled as above stated, by its Supreme Court, in

Starkweather v. *Am. Bible Society*, 72 Ill. 50.
St. Clara Female Academy v. *Sullivan*, 116 Ill. 375.

In the first case, the American Bible Society, a cor-

poration organized in New York, and by the laws of that State incapable of taking real estate by devise, sought to recover real estate in Illinois given it by will; but the judgment was against such recovery, upon two grounds, one of which is thus stated in the opinion: "We have seen that "the courts of New York have held that such companies "are not authorized to so take and hold property in that "State; and if incapable of doing so there, how, it may "be asked, can it exercise powers and discharge functions "beyond the limits of that State which it is not capable of "doing under the laws of the State which created and en-"dowed it with its powers and functions? Such bodies "have such powers only, as are conferred upon them by "the laws of the State in which they are created."

The second ground of the decision was, that by the laws of Illinois, such a corporation as the Bible Society could not take real estate by devise. In the *St. Clara case* this second ground of decision in the Starkweather case is repudiated, and the true scope of that decision said to be the first ground above stated. The *Starkweather* case, therefore, taken in connection with the *St. Clara* case, settles, as the law in Illinois, that, notwithstanding the laws of that State, in terms, confer certain powers on foreign corporations, no such power can be exercised in Illinois by any such corporation whose charter does not itself grant similar powers. This being a settled construction by the Illinois court of Illinois statutes, ought to be conclusive against appellee's position on this point. See, also:

Thompson v. *Waters*, 25 Mich. 214.
Diamond Match Co. v. *Powers*, 51 Mich. 145.

The case of *Ellsworth* v. *St. L., A. & T. H. R. R. Co.*, 98 N. Y. 553, relied on by opposing counsel as establish-

ing a contrary doctrine, was a case in relation to commercial paper, and, perhaps on that account, is distinguishable from the other cases above cited. But, whether that be so or not, the law of the Illinois courts as to the power of the Illinois Legislature, is the law for the purposes of this case, and that law has, as above stated, been settled against the doctrine of the New York case. It seems clear, then, that if the Illinois Legislature can by law, not restrict, but *enlarge* the powers of an Indiana corporation, this can be done only by what must be tantamount to an act of incorporation under the laws of Illinois, that is, the statute must be such as contemplates making the Indiana corporation also a corporation of Illinois. Such legislative action is very unusual, and if such a power is claimed from the statute, it should be derived, not from inference, but only from language clearly manifesting such legislative intent. The statute of Illinois which is claimed to have enlarged the power of this Indiana corporation (defendant) is that part of the act of Feb. 12, 1855, which reads as follows:

"That all railroad companies incorporated or organ-
"ized under, or which may be incorporated or organized
"under the authority of the laws of this State, shall have
"power to make such contracts and arrangements with
"each other, and with railroad corporations of other
"States, for leasing or running their roads, or any part
"thereof; and also to contract for and hold in fee simple,
"or otherwise, lands or buildings in this or other States
"for depot purposes; and also to purchase and hold such
"personal property as shall be necessary and convenient
"for carrying into effect the object of this act." (2 Starr & Curtis Annotated Statutes [Ill], chap. 114, par. 43.)

Conceding, for the sake of argument that this statute authorized an Illinois corporation to make with an Indiana

railroad company such a contract as is involved in this case, it contains nothing manifesting a legislative intent to enlarge the charter powers of an Indiana corporation by making an Indiana corporation *without* such power to lease an Illinois corporation *with* such power. The "railroad corporations of other States" here referred to are only such corporations as by the laws of their own States have power to enter into the contracts here contemplated. As said by Mr. Justice Miller in *Pensylvania Company* v. *St. L. A. etc., R. R., supra*, where one of the questions was whether a legislative license by Indiana permitting an Illinois railroad to extend its road into Indiana (that is, to exercise in Indiana the same or similar powers to those conferred on it by the laws of Illinois), made such Illinois corporation a corporation of Indiana. "To make such a "company a corporation of another State, the language "used must imply creation or adoption in such form as to "confer the power usually exercised over corporations by "the State, or by the legislature, and such allegiance as a "State corporation owes to its creator. The mere grant "of privileges or powers to it as an existing corporation, "without more, does not do this, and does not make it a "citizen of the State conferring such powers.

"In the case where the corporation exists, even if "adopted by the law of another State, and invested with "full corporate powers, it does not thereby become such "new corporation of another State, until it does some act "which signifies its acceptance of this legislation, and its "purpose to be governed by it." And the court decided that the construction of such road by the Illinois company, under such license, did not make that company an Indiana corporation. So in the case at bar, there is nothing mani-

festing an intent on the part of this appellee to accept any corporate powers from the State of Illinois.

Again, counsel seeks to escape the effect of the decision in the *Alton* case by pointing to the fact that there some twelve miles of the railroad of the Illinois corporation lay within the State of Indiana; whereas, all the railroad of appellant lies within Illinois. But the distinction is not a material one. A general act of the Legislature, approved May 4, 1869, and found in the Revised Statutes of Indiana, 1881, Secs. 3967 and 3970, reads as follows:

"Sec. 1. *Be it enacted by the General Assembly of "the State of Indiana*, That any railroad company organ- "ized and incorporated under the general laws of this "State, for the purpose of building a railroad from any "point in the State to a point on the State line, shall be "authorized to connect with any other railroad already "made from such point on the State line, at any con- "venient point of intersection within this State.

"Sec. 4. Any railroad company organized as in the "first section of this act mentioned, and completing its "connection with its terminal point on the State line by "connection with the railroad of another company, as "authorized by this act, *shall be taken and deemed to be a "company owning and constructing a road to the State "line*, and shall possess all the rights, franchises and priv- "ileges, and be subject to all the obligations and duties of "a railroad company owning a road to the State line, as "prescribed by any general law of this State, not incon- "sistent with the provisions of this act."

The Indiana company in the *Alton* case was originally organized for the purpose of building a railroad from a point in the State to a point on the State line, and thus, under this statute, was entitled to the benefit of all statutes

referring to railroads terminating at the State line. The above sections of the statute of Indiana were before this court in the Alton case. That decision is not based upon the fact that twelve miles of the road were in Indiana, but the case, in the opinion, is treated like the one at bar, as a lease by an exclusively Illinois corporation to an Indiana corporation enjoying all the benefits of one terminating at the State line.

II.

If this lease be *ultra vires* the appellee, it is immaterial whether it be within the charter powers of appellant. If void as to one of the parties to it, it is equally void as to the other. A due regard for public interests, which is the basis of relief in this class of cases, requires that appellant shall repudiate this lease (which it cannot enforce against appellee), and recover from appellee its railroad and equipment. As will appear from the cases cited later, the law allows not only the offending corporation, but the other party to it, to disaffirm an *ultra vires* contract, and recover back property parted with thereunder.

Besides, if the laws of Illinois authorized its railroad companies to lease their lines to foreign railroad corporations, such laws must be construed as referring *only* to such foreign companies as are capable of accepting leases; and a lease like the one at bar by an Illinois corporation to an Indiana corporation, which is without power to accept a lease, may, therefore, be said to be also *ultra vires* of the Illinois corporation. But, even if we assume, for the purposes of argument, that the appellee had power to accept it, still this lease to the appellee is *ultra vires* the appellant.

It will doubtless be claimed that in the Alton case, *supra*, this court has decided this point adversely to appellant, but such is not the fact. In that case, after quoting the first section of the Illinois act of 1855, as follows: "That "all railroad companies incorporated or organized under, or "which may be incorporated or organized under the author- "ity of the laws of this State, shall have power to make such "contracts and arrangements with each other, and with "railroad corporations of other States, for leasing or run- "ning their roads, or any part thereof, and also to con- "tract for and hold in fee simple, or otherwise, lands or "buildings in this or other States for depot purposes; "and also to purchase and hold such personal property as "shall be necessary and convenient for carrying into effect "the object of this act," Mr. Justice MILLER, delivering the opinion, says: "Though it might be said that this "act only authorizes Illinois railroad companies to become "lessees, we think it must be conceded that this enactment "authorized the St. Louis, Alton and Terre Haute Rail- "road Company, which we have already said was exclu- "sively an Illinois corporation, to enter into the lease or "operating contract found in the record."

The question of the powers of an Illinois railroad company was, however, not raised by any of the pleadings, argued by counsel, nor examined by the court in the Alton case; nor could the point be before the court, because the contract there in question had been ratified and confirmed by a special private act of the Illinois Legislature, in force March 11, 1869 (3 Priv. Laws, Ill., 316). This private act is cited in *R. R. Co.* v. *Vance*, 96 U. S. 453.

This language of the Alton case, moreover, is not the decided language of a judgment, but that naturally used

to express an impression as to a matter not necessary to consider seriously. This first impression will, we think, be removed by a careful examination of the railroad legislation of Illinois.

The power given by the statute is clearly limited to companies incorporated by Illinois, and the strict grammatical reading of the section confers power only to become lessees. But, it is said, if there are lessees there must be lessors, and, therefore, authority is impliedly given by the act to give as well as accept leases.

To this reasoning there are two replies:

First—Authority given in a statute by implication is limited to what is *necessarily* implied. Power given to *Illinois* roads to accept leases does not imply authority in any corporation to give a lease to an *Indiana* corporation.

Second—There were, when the act was passed, railroad corporations in Illinois authorized already to lease their lines to other corporations. The railroad corporations of Illinois, existing in 1855, were organized under special acts of the Legislature. The powers granted them by their charters were various. Some had no power either to give or accept a lease. Many, indeed most, could take, but could not give a lease. A large number could lease their lines to other Illinois companies, and a very few could lease to companies of other States.

With reference to this state of facts the Legislature, by the act of 1855, said to the various corporations, some of whom had and some of whom had not, the power already, "You may take a lease of a railroad, either within or without the State," but did not say, "You may give a lease of your own line" to anybody.

Again, why pass the special act ratifying the con-

tract in the Alton case, if the power to make that contract had already been given the Illinois corporation by the act of 1855.

June 30, 1885, the Illinois Legislature passed an act which provides: "That all railroad companies now organ-"ized, or hereafter to be organized, under the laws of "this State, which now are, or hereafter may be, "in possession of and operating in connection with "or extension of their own railway lines, any "other railroad or railroads in this State, or in "any other State or States, or owning and operating a rail-"road which connects at the boundary line of this State "with a railroad in another State, are hereby authorized "and empowered to purchase and hold in fee simple or "otherwise, and to use and enjoy, the railroad property, "corporate rights and franchises of the company or com-"panies owning such other road or roads, upon such "terms and conditions as may be agreed upon between "the directors and approved by the stockholders owning "not less than two-thirds in amount of the capital stock "of the respective corporations becoming parties to such "purchase and sale;" and the last clause of which act reads as follows: "And, provided, further, that nothing "in this act shall be so construed as to authorize any cor-"poration, other than those organized in and under the "laws of this State, to purchase or otherwise become the "owner, owners, lessee or lessees of any railroad within "this State" (Laws of Ill., 1885, pp. 230, 231; 3 Starr & Curtiss (Ill.), Statutes 447).

The act of 1855 was, when the above act of 1885 was passed, and is still in force.

Why provide that nothing in the act of 1885 should be construed to authorize the leasing of an Illinois railroad

by a railroad corporation of another State, if such authority already existed under the act of 1855?

These two subsequent acts of the Illinois Legislature, the private act of 1869, and the general law of 1885, by necessary implication, show the legislative interpretation of the act of 1855. This act has never been judicially construed in Illinois, or elsewhere. In the absence of judicial construction, the legislative interpretation is entited to great weight in this court.

In 1865, an act was passed by the Legislature of Illinois (Exhibit "H" to the bill, *supra*, *p.*), which declares that it shall not be lawful for any railroad company of Illinois to consolidate or lease its road to any railroad company out of the State of Illinois, or to lease any railroad company out of Illinois, without having first obtained the written consent of all the stockholders of said road residing in the State of Illinois, and any contract for such "lease" which may be made, without having first obtained said "written consent, signed by the resident stockholders in "Illinois, shall be null and void."

This act of 1865 contains no grant of power, but is a limitation of the power, possessed by a few companies, to lease their lines to foreign corporations, and the power, possessed by all the railroad corporations under the act of 1855, to take leases of railroad lines outside of the State.

We have contended that appellant had no power to lease its line to appellee, and, if we are right, the act of 1865, has no application to this case. But, if we are wrong as to the act of 1855, then the instrument we are considering is void under the act of 1865.

The bill alleges that at the time of the execution of said lease, a large number of stockholders of the complainant were residents of the State of Illinois, and that

neither at the time of the execution of said lease, nor at any subsequent time, did all or any of said resident stockholders consent in writing to the execution of said lease. The demurrer admits this.

It would seem that nothing more was necssary to show the invalidity of said lease than a reference to the foregoing statute and the allegations of the bill of complaint.

The statute declares a lease of an Illinois road to a railroad company out of the State, without the consent of the Illinois stockholders first obtained, to be *void;* and no reasoning or citation of authorities can make it more so. So it is written by the powers having authority to prescribe the terms on which a lease may be made, and neither the parties nor the court is authorized to prescribe any other terms, or make valid that which the law-making power has said is void.

"The courts are wont to allow to such peremptory "language of the statute full force and effect."

Town of Eagle v. *Kohn*, 84 Ill. 292.
Richeson v. *People*, 115 Ill. 460.

The written consent of the resident stockholders was a condition precedent to the validity of the lease. Without strict compliance with the condition, the instrument is void.

F. L. & T. Co. v. *St. J. & Denver R. R. Co.*, 1 McCrary, 247.

In *Archer* v. *R. R. Co.*, 102 Ill. 493, the court expresses the opinion that this contract could not be valid, as a lease, under the act of 1865. This act was repealed in 1874, and it is contended that the continuing execution of

the contract since such repeal is equivalent to a re-execution, and that the act required the consent of resident stockholders *only* for the protection of such stockholders, who have waived the condition by acquiescence and are not now complaining.

Neither of these positions is in accord with the language of the Archer case, *supra*. There, the bill was filed to restrain the distraint for taxes not payable until 1879, or upwards of five years after the repeal of the act of 1865, and the court holds the contract has not been ratified, and doubts whether it could be.

It is contended, however, that this contract is not a lease. The following authorities show that it is a lease:

The Great Northern Ry. Co. v. *The Eastern Ry. Co.*, 9 Hare, 308, 312.

Thomas v. *R. R. Co.*, 101 U. S. 71, 72, 78.

Penn. R. R. Co. v. *St. L., A. & T. H. R. R. Co.*, 118 U. S. 290.

O. & M. R. R. Co. v. *I. & C. R. R. Co.*, 5 Am. Law Reg. [N. S.], 737, 738.

As said in the Thomas case of the instrument there in question: "It is denied by the plaintiffs that the contract can be fairly called a lease.

"But we know of no element of a lease which is "wanting in this instrument. 'A lease for years is a "contract between lessor and lessee for possession of "land, etc., on the one side, and a recompense by rent, "or other consideration, on the other.' (4 Bac. Abr. 632.)

* * * * * * * * * * * *

"The provision for the complete possession, control "and use of the property of the company and its fran-"chises by the lessees is perfect. Nothing is left in the

" lessor but the right to receive rent. No power of con-
" trol in the management of the road and in the exercise
" of the franchises of the company is reserved."

The weight to be given to the opinion and decision in the case of *Archer* v. *R. R. Co.*, 102 Ill. 493, so far as they bear upon this question, we discuss hereafter.

But whether this contract is a lease or not, by its terms appellant has attempted to part with the *entire control of the operation and management* of its line. Such a contract it could not make without direct legislative authority. In this respect this contract has all the objectionable features of the contracts in the Thomas and Alton cases, *supra*.

The only legislative grants of power, which either counsel or the circuit judge suggest authorize this contract, are found in the law of 1855, already discussed, and in the thirteenth section of the act of 1867, amendatory of appellant's charter, quoted on page 15 of this brief.

By this section, appellant is authorized to consolidate or connect its railroad with any other continuous line of railroad in the State of Indiana, upon terms to be agreed upon by the companies so connecting or uniting.

The circuit judge thinks this contract can be upheld under the power to consolidate. Counsel, in the court below, relied on the power to connect.

But, when two railroad companies are consolidated, neither surrenders the entire control of its property, but each has a voice in the management of the amalgamated lines in proportion to the interests acquired by it in the new company, and a contract for the connection of the two railroads so as to form a continuous line does not require the surrender by either company of the management

of its own line, even as to through business, and certainly not as to local business. As elsewhere shown, statutes of Indiana, containing the power to consolidate or connect as fully, certainly, as the one in question, were held, in the Alton case, not to authorize a contract, which, as related to such statutes, is identical with the one now under consideration.

It was contended by counsel for appellee, in the Circuit Court, that the identical lease, or contract, which is in question here, was decided by the Supreme Court of Illinois to be a valid contract, in the case of *Archer* v. *R. R. Co.*, 102 Ill. 493, and that, both because that case was an interpretation of Illinois statutes by the Illinois court, and because by that case a rule of property was established which must be respected as to property of which Illinois is the *situs*, that case is binding upon the Federal courts and decisive of the case at bar. Although the circuit judge does not, in his opinion, refer to this position of counsel, it will, doubtless, be pressed upon this court. To clearly present the reasons, which seem to us to demonstrate the unsoundness of this claim, it is necessary to examine the *Archer* case at some length.

In that case a bill for an injunction was filed by this appellee against Archer et al as collectors of taxes, to restrain such defendants from distraining on and selling, in payment of a tax levied by the State of Illinois on the capital stock of the present appellant, certain rolling stock and right of way, of which appellee was in possession by virtue of the lease or contract now in question here.

The bill in that case did not claim that the complainant therein owned the property in controversy absolutely, nor did it define the extent or nature of its interest therein, but simply set up the possession under said lease or con-

tract, and alleged such a property interest in complainant as would be irreparably injured, unless the defendants were enjoined, etc. The lower court granted the relief prayed, but on appeal to the Supreme Court the decision was reversed, and the bill dismissed for want of equity.

The extent of the *decision* in the *Archer* case is, that the appellee here has not such a property interest in the property of which it has acquired possession under the contract in question as entitles it to an injunction to restrain the seizure and sale of such property to pay taxes assessed against this appellant. To support this *decision* it is not necessary to hold the contract in question valid, because, if it be invalid, the appellee clearly acquired no property rights thereby.

The binding force of the *Archer* case, as a rule of property, is limited to the decree and what was necessarily decided in arriving at that decree, and does not extend to all or any of the reasons given in the opinion of the court in support of its judgment. As said by that court, in *Stephens* v. *Pratt*, 101 Ill., at page 231: "It is nowhere "decided that parties have vested rights in the reasons "assigned for decisions."

This court has said: "And, therefore, this court, and "other courts organized under the common law, has never "held itself bound by any part of an opinion, in any case, "which was not needful to the ascertainment of the right "or title in question between the parties."

Carroll v. *Carroll*, 16 Howard, 275.

But, it is said, the opinion in the *Archer* case contains the interpretation of Illinois statutes by the highest court of the State, and decides, not only that the contract in question is not a lease, but, also, that it is such a contract as is

authorized by the laws of Illinois. If this were true, which we deny, still we insist such interpretation of the statutes of Illinois would not be binding on this court, because unnecessary to the decision of the point involved in the case as before shown.

In *Carroll* v. *Carroll*, *supra*, this court says: "If the "construction put by the court of a state upon one of its "statutes was not a matter in judgment, if it might have "been decided either way without affecting any right "brought into question, then, according to the principles "of the common law, an opinion on such a question is not "a decision. To make it so, there must have been an "application of the judicial mind to the precise question "necessary to be determined, to fix the rights of the par-"ties, and decide to whom the property in contestation "belongs."

As to the character of the contract, the *Archer* case is not binding upon this court, because in that respect it is but the construction or interpretation of a contract, which is not a decision on local law.

Foxcraft v. *Mallet*, 4 Howard, 353.
Thomas v. *Hatch*, 3 Sumner, 170.

This principle was applied to a private statute of the State of New York, in

Williamson v. *Berry*, 8 How. 495, 543.

If, therefore, an interpretation or construction has been placed upon this contract in the *Archer* case, which we deny, that case will, like any other authority cited to this court, be given only such weight in determining the character of this instrument as the judgment of this court thinks it is entitled to. If the character of this contract has, in the Archer case, been defined at all, it is

that, it is simply a contract for "connecting the railroads "of the respective companies so as to secure a con- "tinuous line between distant terminal points." Such a contract is so foreign to the manifest object of the parties, as appears from the terms of this contract, that but for the expressions of Mr. Justice Scott we would never have thought it susceptible of such a construction. Did a contract for the connecting of the two roads so as to form a continuous line require one road to surrender to the other the possession and entire management and control of its road and equipment for the period of 999 years, with the right to impose and collect tolls, not only for carriage over the through line, but, also, for such carriage between two Illinois towns on appellant's line? What rights remain to appellants as a connecting road after it had deprived itself of the ability to use its road or collect tolls, or do any other act in the management of it? The authorities heretofore cited clearly show this contract to be a lease, and there is nothing in this *Archer* case, upon this point, which entitles it to overcome the weight of these decisions.

But the opinion in the Archer case does not hold either that this contract is not a lease, but merely a connecting contract, or that it is such a contract as is authorized by the laws of Illinois. The Illinois court says, page 502, that the contract can hardly be interpreted as a lease, "and yet find any sanction in the law for the making;" then, after reasoning that, if a lease, it was void when made, because forbidden by the Illinois statute of 1865, and that, even if it could be ratified, it had not been, and showing that by its terms it was not a contract of consolidation, the court says: "It follows, then, it was "simply a contract for connecting the railroads of the "respective companies."

From what did it follow that it was such a contract? From the fact that, in any other view, it was of no validity.

Bearing in mind that the only question before the court was, whether the interest of the Indiana corporation, if any, in the property involved was sufficient to justify the issuance of the injunction prayed, and reading the sentence last quoted with reference to the preceding remarks of the court and the point involved, is it not plain that the meaning is: "It follows then, that, *if valid at all*, it was simply," etc.? Are we not, in like manner, entitled, in the sentence of the opinion commencing the paragraph on page 503, "construing the agreement, as must be done, as a contract," etc., to interpolate after the clause "as must be done," the words, "in order to give it any validity whatever?" The gist of the opinion is, that the contract, if of any force at all, must be a connecting contract, because no other kind of contract, which this can possibly be, is authorized by the laws of the State, and, under a connecting contract, the complainant would not acquire such rights in the property in question as to entitle it to the injunction asked. The court does not hold that it is a connecting contract, only that, *if anything*, it is a connecting contract. Having decided the contract void, if a lease, that was the end of the case, and what is subsequently said about its being obligatory as a connecting contract, was outside of the case. It made no difference whether valid or invalid as such contract. In either event, the property was liable for the taxes.

The second ground on which the opinion places the decision in the *Archer* case, viz.: that if the complainant performed its duty under the contract, there would be no occasion to ask for the injunction, must, also, be viewed with reference to the point involved and the views already

expressed by the court. In effect the latter part of the opinion is: " But, even if this contract is valid as a mere " connecting contract, and we are wrong as to the extent " or character of the rights complainant would acquire " under such a contract, still, under this particular contract " it is entitled to no relief, because, if it will perform what, " by the very contract it claims under, it is required to perform, it will have no " occasion for an injunction." Again, if the opinion in the Archer case is an interpretation of the statutes of Illinois at all, it is only such an interpretation with reference to an Indiana corporation authorized by the *laws of Indiana* to execute the contract in question. The following language of the opinion, page 503, demonstrates this: " Both companies signing the agreement had full authority " from the States creating such corporations to make such " an agreement, and, placing that construction upon it, the " contract is valid; otherwise it will be void, because *ultra* " *vires*." This language also shows that, if the question before the court had been whether the contract " was valid or invalid," and one of the parties to it was a corporation, foreign to the State, and not authorized by the laws of its own State to enter into the contract, the court would have decided the contract void. The clause " otherwise it would be void," can have no other meaning. So that the Illinois Supreme Court has virtually said that, in a State court sitting in Illinois, the contract in question in this case must be held invalid, unless the appellee was authorized by the laws of *Indiana* to execute it. This case, therefore, hardly supports the claim of appellee's counsel that the *Illinois* statute has *enlarged* the Indiana charter of appellee and conferred upon appellee the power to accept the lease in controversy. The power of appellee under Indiana laws to enter into this contract,

the court in the *Archer* case, did not pass upon. If it had, it would make no difference, for, upon that point, this court is not bound by any decision of an Illinois court, and has already decided for itself in the *Alton* case.

Finally, the Archer case can not, except as to the parties to it, of whom appellant was not one, be binding anywhere as an exposition of local statutes, or law, or as establishing a local rule of property, unless in cases where the facts are substantially the same as in that case. But there is one essential fact which does not exist in the case at bar, which did exist in the Archer case as determined by the Illinois court.

The question of the power of appellee, under the laws of *Indiana* to execute the contract, in the Archer case, or any case in a State court of Illinois, is a question of fact (*Hyman* v. *Bayne*, 83 Ill. 256). The fact was assumed, or established, in that case that appellee was so authorized, and that decision was given on the basis of that among other facts. In the case at bar appellee is not so authorized. The corporation is the same in both cases, but, as presented to the two courts, its powers as to this contract are different. The local rule of property, if any, deducible from that case, is, therefore, that an Illinois corporation could make with an Indiana corporation *capable of accepting* it, a lease or contract similar to the one in controversy. But this rule or principle has no application to this case, for the facts here are essentially different, in that the Indiana corporation here has no power to accept the lease or contract.

In *Lauriat* v. *Stratton*, 6 Sawyer, 339, Judge Deady refused to adopt the construction of the State court of its own statute, because the decision was evidently made upon a misapprehension of the terms of the statute, and

would undoubtedly be corrected if the point were raised again in the State court. The Archer case is based upon a clear mistake of foreign law, that is, a mistake of fact, and it is very plain that the Illinois court would recede from its decision in that case if the question were again to arise there, this court having since authoritatively decided against the appellee's power under the Indiana statute to accept the lease. In this view the Archer case can not be deemed such a fixed, *settled* rule of property as is contemplated in all the cases upon this subject.

In *Pease* v. *Peck*, 18 Howard, 595, it is said there are many exceptions to the rule that the Federal courts are bound to follow the State decisions in the construction of State laws. A decision based upon a clear mistake of foreign law ought to be one of the exceptions.

III.

For seventeen years prior to the filing of this bill, the appellant has acquiesced in the possession and operation by the appellee of appellant's road and other property under the lease in controversy. But no ratification however clear, or acquiescence however long continued, can make valid an *ultra vires* and void contract like the one in controversy. We need not consider this question in reference to strictly private corporations. In view of the authorities, its correctness can no longer be questioned as applied to *ultra vires* contracts, which disable *quasi* public corporations, such as railroads, from discharging their obligations and duties to the public.

Such a corporation "cannot absolve itself from the "performance of its obligations, without the consent of the "Legislature."

York, etc., R. R. Co. v. *Winans*, 17 Howard, 39.
Black v. *Canal Co.*, 22 N. J. Eq. 399.

What such a company cannot do directly, it cannot do indirectly by ratification, acquiescence or laches. In

Thomas v. *Railroad*, 101 U. S. 71,

where, in an action upon a lease of a railroad, which this court adjudged *ultra vires*, it was urged by counsel that by possession under the lease for four years and other acts in performance thereof, the contract had been ratified as to the executory part of it, this court, after speaking of the duty of the company to repudiate such contract, says: "Though they "delayed its performance for several years, it was, never- "theless, a rightful act when it was done." And that to hold otherwise is "to hold that any act performed in exe- "cuting a void contract makes all its parts valid, and that "the more that is done under a contract forbidden by law, "the stronger is the claim to enforcement by the courts."

And in *Pennsylvania Company* v. *St. Louis, Alton & Terre Haute R. R. Co.*, 118 U. S. (*supra*):

"Although it was urged," says the court, "that, "though the contract of lease may be void, so that no action "could originally have been sustained upon it, there has "been for ten years such performance of it, in the use, "possession, and control of plaintiff's road and its fran- "chises, by the defendants, that they cannot now be per- "mitted to repudiate or abandon it." But this court, citing with approval *Thomas* v. *Railroad*, *supra*, said, in refusing to enforce the contract: "We understand the rule "in such cases to stand upon the broad ground that the "contract itself is void, and that neither what has been "done under it, nor the action of the court, can infuse any "vitality into it." The rule here established is asserted in

Oregon Ry., etc., Company v. *Oregonian Ry.*, 130 U. S. 1.

In *New Castle Northern Ry. Co.* v. *Simpson*, 21 Fed. Rep. 533, where a construction contract involving the issuance of stock by a railroad company was held *ultra vires*, and void as contravening the constitution of the State of Pennsylvania, the court say: "It is, indeed, in- "ferable from the evidence that all the stockholders of the "plaintiff company either expressly assented to the con- "tract of October 5, 1883, or acquiesced for a season "therein. But it is shown in *Thomas* v. *Railroad Co.*, 101 "U. S. 71, 83, that a contract not within the scope of the "powers conferred on a corporation, and against public "policy, cannot be made valid by the assent of every one "of the shareholders." In

Board of Commissioners, Tippecanoe Co. v. *L. B. & N. R. R.*, 50 Ind. *supra*,

the lease of a railroad being held void as *ultra vires*, the claim of ratification and estoppel was rejected by the court, which said: "A contract *ultra vires* the charter is "void, and cannot be made valid by any subsequent act "of the corporation, because there is no residuary power "to confirm it. What they could not make, they cannot "confirm. A void act can never become valid, merely "because it remains unquestioned."

See, also,

O. & M. R. R. Co. v. *I. & C. R. R. Co.*, American Law Register, vol. 5, new series, p. 739.

IV.

The lease being void, it was the right as well as the duty of appellant to recover its property, and thus place itself again in a position to discharge its public duties.

The learned circuit judge held that "the relief sought "by the complainant is inequitable and against the rules, "which govern courts of conscience;" and while this appellant could rely upon the conceded invalidity of the contract by way of *defense*, it could not obtain *affirmative relief* in the court of equity, because that court will not "annul an illegal contract at the suit of a party to it." On the other hand, in

Thomas v. *Railroad*, *supra*,

Mr. Justice MILLER, after having declared the lease of the railroad in that case to have been a violation of the contract with the State, and void, as against public policy, said: "Having entered into the agreement, it was the *duty* "of the company to rescind or abandon it at the earliest "moment."

These views are irreconcilable; for if it is the duty of this appellant to extricate itself from the position in which it has become involved contrary to law, it is equally incumbent upon a court of equity to give its aid, when appellant is seeking to dischage this duty by a resort to its jurisdiction, instead of by an appeal to force. The rule, "*In pari delicto potior est conditio possidentis aut defendentis*," as a general principle of equity, is conceded. But there is an exception to this rule as well established as the rule itself, within which this case clearly falls, and this exception appears to us to have been entirely overlooked by the learned circuit judge. That exception is thus stated by the text-writers:

"In cases where the agreements or other transactions "are repudiated on account of their being against public "policy, the circumstance, that the relief is asked by a "party who is *particeps criminis*, is not in equity ma-

" terial. The reason is, that the public interest requires " that relief should be given, and it is given to the public " through the party. And in these cases relief will be " granted, not only by setting aside the agreement or " other transaction, but, also, in many cases, by ordering " a repayment of any money paid under it."

Story's Eq. Jur., sec. 298.

Pomeroy's Eq. Jurisprudence, sec. 941 (quoted under next point), is to the same effect.

A bond given by a grandson to a person as a reward for his using his influence over a grandfather to induce him to make a will in favor of the grandson, was, on bill filed by the grandson, directed to be given up. Lord Chancellor HARDEWICKE, in delivering the opinion, said: " The plaintiff himself being *particeps criminis;* so that " if it had not been for the ingredient of public policy, he " could hardly have come here for relief. In all those " cases the court sets them aside, not for the party's sake, " but for the benefit of the public:" * * * " because the objection, that infects the bond, arises from " public consideration, the court will relieve."

Debenham v. *Ox*, 1 Vesey, Sr. 276.

In *Smith* v. *Bruning*, 2 Vernon's Reports, 392, the court not only decreed a marriage brokerage contract to be given up, but a gratuity of fifty guineas, actually paid, to be refunded. Also,

Drury v. *Hooke*, 1 Vernon, 411.

In *Lord St. John* v. *Lady St. John*, 11 Vesey, Jr. 526, where a husband filed a bill to set aside a contract made with the trustees, providing for separate maintenance and in reference to the custody of the children, which

was adjudged void, Lord Chancellor ELDEN said: " Where " the transaction is against policy, it is no objection that " the plantiff himself was a party in that transaction which " is illegal."

In *O'Conner* v. *Ward*, 60 Miss. 1026, a widow and daughter of a decedent had been induced by the defendant, in whom they had reposed confidence, to convey to him, for a fraudulent purpose, the estate of the decedent, consisting of a plantation and personal property, and afterwards, upon a bill filed, they were allowed to recover the property, the court saying: " The rule appealed to by the " defendant, that when parties are in *pari delicto*, the court " will lend its aid to neither, is subject to the exception " that where public interest requires its intervention relief " will be granted, though the result may be that the prop- " erty will be restored to or a benefit derived by a plaintiff " who is in equal guilt with the defendant. In such cases " the guilt of the respective parties is not considered by " the court, which looks only to the higher right of the " public, the guilty party to whom relief is granted being " only the instrument by which the public is served."

See, also, *Morris* v. *McCullock*, 1 Ambler Ch. 432.

In *New Castle R. R.* v. *Simpson*, 21 Fed. Rep. 533, a bill was filed by a railroad corporation to cancel a construction contract it had made with defendant, and which defendant had partly performed. The contract being contrary to a provision of the State Constitution, was canceled, Judge ACHESON, saying upon the point now under discussion: " Where there is fraud against public " policy, a court of equity will rescind, notwithstanding " the party plaintiff has participated therein, if public

"policy would be defeated by allowing the instrument to "stand." * * * * "The suit is by the cor- "poration, which owes a paramount duty to the public. "Its former course was inexcusable, indeed; but, having "retraced its false steps, it is now in the right pathway. "Having entered into a contract forbidden by public "policy (as was said in *Thomas* v. *Railroad Co., supra*), "'it was the duty of the company to rescind or abandon it "at the earliest moment.' This it has done; but to the "end that it may the better discharge its obligations to "the public, it needs the aid of a court of equity to set "aside the improvident and illegal contract with which it "is embarrassed." In

Atlantic & Pacific Telegraph Co. v. *Union Pacific R. R. Co.*, 1 Fed. Rep. 745; and, *Western Union Telegraph Co.* v. *St. Joseph & Western R. R. Co.*, 3 Fed. Rep. 430,

which are more fully referred to under the next point, Judge McCrary held that *quasi* public corporations, like appellant, cannot retake property conveyed under an *ultra vires* contract, but *must* resort to equity for that purpose.

Under the rule above stated, even if this lease be *ultra vires* only of the appellee, it needs no argument to show that it is not only contrary to the public policy in Illinois for appellant to surrender to an irresponsible foreign corporation property or functions vested in appellant for the performance of public service, but it is also contrary to that general policy which knows no State limits, but arises from considerations of inter-state commerce, for a railroad to embark in enterprises foreign to the purposes of its organization. The efficiency of the rail-

road to perform its proper functions is liable to be thereby impaired, and thus the general public may be injured.

V.

The bill makes a case for chancery jurisdiction. While the learned circuit judge thought otherwise, and suggested an ample remedy by ejectment, it will, we think, seem perfectly clear when the character of this suit, and the nature of the relief sought, are considered, that a court of law affords no plain, adequate and complete remedy.

The object of this suit is to rescind and terminate an illegal contract into which these two corporations have entered, and to place appellant again in a position to discharge its duties to the public, by restoring to it, upon such terms as may be equitable, all the property received by appellee under the illegal contract. The courts of law furnish no appropriate action for this relief. In an action of ejectment, if proper for the recovery of a railroad, the appellant would recover only the right of way, depots and such of the property as is real estate. But by the Constitution of Illinois, Art. 11, Sec. 10: "The rolling stock and all other movable property belonging to any railroad company" is personal property. To recover, therefore, the rolling stock, machinery, tools, etc., the appellant must resort, also, to an action of replevin. Such an action in Illinois would reach only such rolling stock, etc., as happened then to be in Illinois. But by the lease in question the appellant's Illinois railroad and appellee's Indiana railroad are operated as "one road between Indianapolis and St. Louis." To recover such of this rolling stock as might be on the Indiana part of this road, appellant would have to

resort to an action of replevin in Indiana. Some of the rolling stock of a railroad—its freight cars— is not, as business is now done by railroads, continuously kept on its own line. Cars loaded with freight for distant points are passed from one railroad to another until they reach the point to which the freight they contain is consigned. This results in the scattering of the freight cars of a large railroad, like the one in controversy, all over the United States. The appellant, therefore, to get its rolling stock, must not only bring replevin in Illinois and Indiana, but in whatever other State any of its rolling stock may, at the time, be found. But, even this would be impracticable, because while appellee in the operation of this road in connection with its own, doubtless, keeps such books or memoranda as would enable it to trace the freight cars passing to other roads, the appellant has no such means of information, without first resorting to a bill for discovery. The only legal remedy, then, for such freight cars as were not found between Indianapolis and St. Louis, would be an action of trover. The complainant would still be entitled, as we shall see, to the cancellation of the contract and an accounting, neither of which could be obtained in a court of law. The jurisdiction of equity in this case would then be sufficiently maintained on the ground of avoiding multiplicity of suits. It is equally well based upon the utter inadequacy of legal remedies as a means of recovering possession of a large railroad system and its equipment.

Such property is *sui generis*, and the ordinary legal remedies have no application to it. While the action of forcible entry and detainer has been applied to a railroad, in *Railroad* v. *Johnson*, 119 U. S. 608, the controversy

there was over a short railroad right-of-way, only recently constructed, and not yet equipped, or opened to the public. We find no case where ejectment, or any similar legal remedy has been resorted to to recover possession of a railroad system in full operation. Such a road the public are interested in having operated without interruption. It is important that any change of possession should be with the least possible annoyance to the public. This can be accomplished in one suit in a court of equity much better than by several suits at law for separate parts of such property. By the latter public travel would be interrupted, unless results were obtained simultaneously in all the legal actions, a result not always possible. Nor could a court of law, like a court of equity, compel the appellee to disclose the whereabouts of cars on other roads and provide for their return.

While there is no single, certain or adequate remedy at law, the jurisdiction of equity in this case is sustainable upon several of the recognized grounds of equity jurisdiction.

Equity has jurisdiction to cancel and set aside an illegal contract and *restore the property* held under it to the party entitled.

"Even where the contracting parties are *in pari delicto* "the courts may interfere from motives of public policy. "Whenever public policy is considered as advanced by "allowing either party to sue for relief against the tran- "saction, then relief is given to him. In pursuance of this "principle, and in compliance with the demands of a high "public policy, equity *may* aid a party equally guilty with "his opponent, not only by canceling and ordering the "surrender of an executory agreement, but even by set- "ting aside an executed contract, conveyance, or trans-

" fer, and decreeing the recovery back of money paid, or " property delivered in performance of the agreement."

Pomeroy's E. Jurisprudence, sec. 941.
Story's Eq. Jur., sec. 298, *supra*.
Debenham v. *Ox*, 1 Vesey, Sr. 276, *supra*.
Drury v. *Hooke*, 1 Vernon, 411, *supra*.
Lord St. John v. *Lady St. John*, 11 Vesey, 526, *supra*.
Smith v. *Runing*, 2 Vernon Reports, 392, *supra*
Morris v. *McCulloch*, 1 Amb. Ch 432.

Under these authorities, the jurisdiction of equity is not based upon the inadequacy of legal remedies, as between the parties themselves. Equity acts in consideration of public interests, although the property passing under the illegal contract might be recovered also by a legal action. These cases are, therefore, in themselves a sufficient answer to the learned circuit judge's suggestion that appellant must resort to ejectment.

Thus, in *Morris* v. *McCulloch*, *supra*, a bill was filed to recover £200, paid defendant for procuring plaintiff a commission of lieutenancy in the marines, and it was insisted that the remedy, if any, was at law in an action for money had and received. Lord HENLEY, chancellor, in deciding the case, said: " The general question is, " whether the case is within the jurisdiction of the court?

" I lay down this rule, that if a man sells his interest " to procure a person an office of trust or service under " the government, it is a contract of turpitude; it is acting " against the constitution, by which the government ought " to be served by fit and able persons, recommended by " the proper officers of the crown for their abilities and with

"purity. This case is within the reason of the determinations "upon marriage brocage, and *post-obit* bonds. It is one "of the most useful jurisdictions of the court, and ought "to be exercised upon all occasion."

"Decree, the £200 to be repaid, with interest from "the time it was advanced by the plaintiff."

It is under this head of jurisdiction that the court of chancery will, upon a bill by a *quasi* public corporation like appellant, cancel an *ultra vires* contract made by it, and restore to it property that it has parted with thereunder.

In *New Castle Northern R. R. Co.* v. *Simpson*, 21 Fed. Rep., *supra*, a bill was filed, as we have seen, by a railroad company to rescind a written construction contract, which, by its terms, was in violation of the State constitution, and, therefore, was held by the court to be *ultra vires*. Judge ACHESON, after stating that the second point in the case was, "Whether the case is one for the inter-"position of a court of equity to rescind it at the instance "of the company," said: "There can be no doubt that "a court of equity may entertain a bill to avoid a con-"tract of a corporation which it has no power to make. "*Auburn Academy* v. *Strong*, Hopk. (N. Y. Chy.) 278. "And constructive fraud involving a breach of trust, or "an abandonment of duty, or a violation of public policy, "is a recognized ground for equitable interposition for the "cancellation of agreements. 1 Story Eq. Jur., sec. 694. "Where there is fraud against public policy, a court of "equity will rescind, notwithstanding the party plaintiff "has participated therein, if public policy will be defeated "by allowing the instrument to stand." The court decreed a rescission, coupled with equitable terms, securing defendant a just allowance for work done under the con-

tract and ordered a reference to a master to fix the amount of such allowance.

In *Telegraph Co.* v. *Union Pacific R. R. Co.*, 1 McCrary, 541 (1 Fed. Rep. 745), the Union Pacific Railroad Company had been chartered by Congress to construct and operate a railroad and also a telegraph line. By a written contract made in 1869 it transferred its rights to conduct a telegraph line to the the telegraph company, and both parties acted under this contract until 1880, when the railroad company repudiated the contract as *ultra vires* and sought, without legal proceedings to retake possession of the property transferred. Upon the bill filed by the telegraph company to prevent this by injunction, Judge McCrary decided the contract to be *ultra vires* and void, but that the railroad company could not take possession arbitrarily, but must resort to legal proceedings, and directed the injunction previously granted to "be so far modified as to make "it clear that the railroad company is at liberty to insti- "tute legal proceedings, either by cross-bill in this case or "otherwise, to cancel and set aside the said contracts "upon a return of the consideration, and to settle and ad- "just, upon principles of equity, the accounts between the "parties." Thus distinctly asserting the jurisdiction of equity in such a case.

In *Western Union Telegraph Co.* v. *St. Joseph & Western R. R Co.*, 3 Fed. Rep. 430, which was a case similar to the last one, the same learned circuit judge again asserts the jurisdiction of equity and the duty of the corporation to resort to it, in the following language: "What I wish to "emphasize in this case, as well as in other similar cases, "is that the defendants have no right to take their remedy "into their own hands.

"If the defendants, after years of acquiescence in the "contract in question, * * became suddenly "convinced that it was a void contract, it was their duty "to apply to the courts for relief, praying a cancellation "of the contract, and a full and fair settlement of all "accounts growing out of its executon in the past.

"Until they seek some such remedy, and until a fair "settlement upon full accounting can be had, they will be "enjoined from attempting to eject the plaintiff or to seize "the property."

The equity jurisdiction here asserted is not in this case at least, affected by the principle of equity that a bill to remove a cloud on real estate cannot be filed by one out of possession, for the following reasons. (1) Because that principle is based upon the adequacy of legal remedies, while this jurisdiction exists, as we have seen, even when the court of law affords a complete remedy. (2) The rule does not apply where the case, as here, presents other equitable features. (3) The contract here includes personal property as well as real estate.

Nor do we overlook that other principle that ordinarily a court of equity will not cancel a contract that is void on its face. This rule is not applied so as to prevent a court of equity from canceling an *ultra vires* contract of a public corporation, although void on its face. In each of the three cases last cited, the *ultra vires* contract was void upon its face. But the present contract, if adjudged invalid simply because of appellee's incapacity, cannot be deemed a contract bearing upon its face the stamp of its invalidity. The capacity of the appellee is a question of Indiana law, and in an Illinois court must, like any other fact, be established by evidence *de hors* the instrument, and we think it should not be the less so here because the

Federal court takes judicial notice of the statutes and laws of the States. The equity jurisdiction of the United States court is no less in this particular than that of the State court.

It is settled by the authorities as well as supported by reason, that a court of equity will, in furtherance of public policy, take jurisdiction to cancel, and compel the return of property received under, such an *ultra vires* contract as the one at bar, even if void on its face, for the reason that such rescission and restoration of property will be permitted only in such manner as will not incommode the public, and upon such terms as are equitable and just as between the parties, and this can be best accomplished in a court of chancery.

Some of the equitable principles which govern such cases are thus stated in some of the cases:

" According to many recent opinions of this court, a " contract made by a corporation, which is unlawful and " void because beyond the scope of its corporate powers, " does not, by being carried into execution, become lawful " and valid, but the proper remedy of the party agrieved " is by disaffirming the contract, and suing to recover, as " on a *quantum meruit*, the value of what the defendant " has actually received the benefit of."

Railway Co. v. *Keokuk Bridge Co.*, 131 U. S. 389.

" To deny a remedy to reclaim it " (the property) " is " to give effect to the illegal contract. The illegality of that " contract does not arise from any moral turpitude. The " property was transferred under a contract which was " merely *malum prohibitum*, and where the city was the " principal offender. In such a case the party receiving

" may be made to refund to the person from whom it has " received property for the unauthorized purpose, the value " of that which it has actually received."

Parkersburg v. *Brown*, 106 U. S. 487.

" The established rule in equity is that a corporation " is accountable for benefits which it has received under " an *ultra vires* transaction."

New Castle Ry. v. *Simpson*, 23 Fed. Rep. 214. Green's Brice's *Ultra Vires*, 717.

" Even if we assume that the contract is void, the " property accumulated or constructed under it must, as " between the parties, be disposed of according to equity, " and the court will not refuse to deal with that property on the ground that it was acquired under an illegal contract. " Such is the doctrine established by the Supreme Court " of the United States."

The Western Un. Tel. Co. v. *The Un. Pac. Ry. Co.*, 1 McCrary, 558, 3 Fed. Rep. 423.

In this case a plaintiff and defendant having jointly expended moneys in the construction of a telegraph line, it was held that upon setting aside the contract the parties became joint owners, and thereby was presented " a " case for equity jurisdiction in the adjustment and set- " tlement of their respective interests.".

"As the parties and the subject-matter are now before " the court, it is the duty of the court, as for as possible, " to place them in *statu quo*."

A. & P. Tel. Co. v. *U. P. Ry. Co.*, 1 Fed. Rep. 745; 1 McCrary, 549.

In *Farmers' Loan and Trust Co.* v. *St. Joseph and Denver City Ry. Co.*, 2 Fed. Rep. 117, 1 McCrary, 247,

a Nebraska railroad company leased its road to another company, and the lease was adjudged *ultra vires* and void, and the railroad having returned to the possession of the lessor company, Judge McCrary said: "Inasmuch as the transaction is not tainted with "any immorality, I hold that the petitioner (lessor) is en- "titled to recover, without regard to the contract, a just "compensation for the use of its road and property dur- "ing the time in controversy."

That corporations are answerable to the extent that they have received property, or been benefited under their *ultra vires* contracts, is also declared in:

Spring Co. v. *Knowlton*, 103 U. S. 49.
White v. *Franklin Bank*, 22 Pick. 181.
Day v. *Spiral Springs Buggy Co.*, 57 Mich. 146.
Foulk v. *San Diego, &c., R. R.*, 51 Cal. 365.
Harriman v. *First Baptist Church*, 63 Ga. 186.
Davis v. *Old Colony R. R.*, 131 Mass. 258.

To adjust the rights of the parties here under the principles above stated, and to afford appellant full relief, an accounting is necessary. The principles to govern such an accounting need not be here considered. It is sufficient to sustain the jurisdiction, if under any theory an accounting is essential.

Upon one theory (that seems the correct one under the decisions of this court), the appellant is entitled to the restoration of all of its property appellee has had the benefit of under the *ultra vires* contract. This applies as well to the earnings as to the tangible property. Both are received under the void contract. But this right of appellant to the earnings is subject to the deduction of

disbursements and expenditures and other like proper allowances to appellee. Such earnings as well as such expenditures, etc., can only be ascertained by an accounting.

If, on the other hand, the property transferred by the lease is alone to be returned to appellant and not the net profits of the road while in appellee's possession, then appellant is entitled in addition to its property, according to *Farmer's Loan & Trust Co.* v. *St. Joseph & Denver City Railway, supra*, to a just compensation for its use. What that is can only be properly determined by an accounting.

The bill alleges that the appellee has, since it received possession of appellant's road, appropriated to its (appellee's) own use all the earnings therefrom (*Record, p. 48*). The contract, therefore, according to the bill, is wholly executory on the part of appellee. If, however, the evidence should disclose that for a part or all of this time the appellee had accounted under the lease, then, according to some of the cases—the doctrine apparently does not receive the sanction of this court—the *ultra vires* contract ought to stand so far as executed. Still, appellant would be entitled to an accounting not only so far as the contract was still executory, but to ascertain how far it had been fully executed by appellee.

Appellant is also entitled, under the bill, to an accounting of the tangible property received by appellee under the lease to ascertain how much has been destroyed in its use, what renewals or additions have been made thereto from the earnings of the road, and what property is now on hand.

The bill alleges—it is self evident without such allegation—that such accountings will involve long and compli-

cated accounts, covering a period of nearly seventeen years, which can only be properly investigated under the direction of a court of equity.

Again, the property transferred under this void lease remained trust property, and this court has on that ground jurisdiction of a bill for its recovery.

In *Hardy* v. *Metropolitan Land and Finance Company*. L. R. 7 Ch. Appeals, 427 (1872), the directors of a building society, by breach of trust and without authority of the act of Parliament and the rules of the society, deposited £275 with the defendant. A *bill* was filed by the society to recover this money. The answer insisted "that the relief sought by the bill was in the nature of a "mere money demand, and might be properly dealt with "by a court of law." The master of rolls dismissed the bill because the remedy was at law. Upon appeal to the Court of Appeals in Chancery the court held the bill maintainable. Lord Justice JAMES saying: "The only ques- "tion is, whether this was so clearly a mere money de- "mand that the court has no jurisdiction to deal with it, "but must turn the plaintiffs away from its doors to "seek their remedy elsewhere. At first it appeared "to me that there was some difficulty on this "point. But now it appears beyond all doubt that this "money was money belonging to the London Building "Society, and that it was not in accordance with the act "of Parliament or their rules, that it should be lent to or "deposited with the Metropolitan Land Company. It "was, therefore, trust money, placed by an improper act "of the directors of the London Building Society in the "hands of the defendants, and, as they have never dis- "charged themselves from it, *it is trust money* still in their "hands. It is, therefore, in my opinion, open to the

" plaintiffs, finding *this trust money* in the hands of the " defendants, to call upon them to pay it back.

" I am of opinion that the court has jurisdiction to " order the money to be paid to the plaintiffs, and that " their bill ought not to be dismissed on the technical " ground that their remedy is in a court of law."

See also

Ernest v. *Croysdill*, 2 De G., F. & J. 197.

Bryson v. *Warwick Canal Co.*, 4 De G., M & G. 731.

Salomons v. *Laing*, 12 Beav. 382.

To summarize under this point, equitable jurisdiction is sustainable here upon the following grounds: (1) Because the courts of law furnish no plain, adequate and complete remedy. (2) Because it will avoid multiplicity of suits. (3) Equity has jurisdiction on the ground of public policy to cancel an illegal or *ultra vires* contract, and to restore property taken under it. (4) Because an accounting is necessary involving the investigation of complicated accounts. (5) Because a trust is involved and the suit is to recover trust property.

VI.

The learned circuit judge sustained the demurrer upon the ground, also, that the bill upon its face discloses such laches as to bar relief. This raises two questions:

1. Whether the doctrine of laches has any application here.

2. Whether the bill discloses laches under the circumstances of this case.

1. Relief in cases like the one at bar is granted mainly, if not solely, from a due regard to the interests of

the public. If the public were not concerned, it is doubtful if appellant would be entitled to any relief.

We have seen that neither one of these corporations could "absolve itself from the performance of its obligations without the consent of the Legislature."

"Where a corporation, like a railroad company, has "granted to it by charter a franchise intended in large "measure to be exercised for the public good, the due "performance of those functions being the consideration "of the public grant, any contract which disables the cor-"poration from performing those functions, which under-"takes, without the consent of the State, to transfer to "others the rights and powers conferred by the charter, "and to relieve the grantees of the burden which it im-"poses, is a violation of the contract with the State, and "is void as against public policy."

Thomas v. *Railroad Co.*, *supra*.

"When the public is concerned to restrain a corpora-"tion within the limit of the power given to it by its char-"ter, an assent by the stockholders to the use of unau-"thorized power by the corporate body will be of no "avail."

Kent v. *Quicksilver Mining Co.*, 78 N. Y. 185.

We have seen under the third point of this brief that to allow these two corporations to ratify or confirm the illegal contract into which they have entered by any act, however strong, or any acquiescence, however long, is contrary to public interest, and, therefore, not to be sanctioned.

Under the fourth point of this brief, we have seen that the usual rule that courts will not interfere in favor of either party to an illegal transaction, does not apply here, because "*the public interest requires that relief*

"*should be given, and it is given to the public through* "*the parties.*"

If the maxim that a plaintiff "who comes into equity must come with clean hands" does not close the door of a court of equity against this appellant, because it is against public interest to do so, does not that same regard for public interest interfere also to prevent appellant from being turned away by that other, but no stronger, maxim of equity—"*Equity aids the vigilant; not those who slumber on their rights.*" A suitor who is unclean is as objectionable to a court of equity as one who is merely careless. The public obtains its relief through the instrumentality of the former. Why should it not be equally relieved at the suit of the latter?

If, as we have seen, the most formal ratification could not operate to bar the public from relief, why should mere delay have that effect? If, according to *Thomas* v. *Railroad*, *supra*, it was the duty of appellant to rescind or abandon this contract because it violates its obligations to the State, was it less a duty in 1887 than it was in 1870, and immediately after it had entered into it? It is true appellant has been guilty of wrong doing in the past; but is this a reason why a court of equity, by the application of the doctrine of laches, should compel the appellant to continue its wrong doing for the full term of this contract? In *Telegraph Company* v. *Union Pacific R. R.*, and *Western Union Telegraph Co.* v. *St. Joseph & Western R. R. Co.*, *supra*, it is held that appellant *must* resort to equity to rescind this illegal contract. But, if equity will not help him because of laches, how then is he to perform this duty to rescind? Where equity grants relief for the protection of public interests, the doctrine

of laches does not apply, for laches is not imputable to the public. "*Nullum tempus occurrit regi.*" See

City of Alton v. *Ill. Transportation Co.*, 12 Ill. 38, 60.

In this case the court, without deciding what the rule would be as to property held by a municipal corporation exclusively for the use of its own people, decided that time will not run against the public generally, so as to bar the city from recovering a landing place upon the Mississippi river, used by the general public.

2nd. Do the facts disclosed in the bill make a case of laches?

"A court of equity applies the rule of laches accord-
"ing to its own ideas of right and justice. Every case is
"governed chiefly by its own circumstances. Whether
"the time the negligence has subsisted is sufficient to make
"it effectual, is a question to be resolved by the sound
"discretion of the court."

Brown v. *County*, 95 U. S. 157.

While many cases may be found in which a delay of less than seventeen years has been held laches, cases are not wanting where delay for a longer period of time has been held not to constitute laches. If the court upon this question of time is to be governed by the analogy of the statutes of limitations, the delay of seventeen years does not bar relief. By the statutes of Illinois (ch. 83, sec. 1, R. S. of 1874) twenty years is a limitation upon an action for the recovery of lands. True, in the same chapter (sec. 6) seven years' possession and payment of taxes under claim and color of title bars an action for the recovery of land. But by section 8, same chapter, this last limitation does not

apply "to lands held for any public purpose." The limitation does not apply to this case for these further reasons:

1. The bill discloses no payment of taxes by appellee.

2. If it did, the bar does not arise from the payment of taxes, which it is the duty of the party to pay.

Medley v. *Elliott*, 62 Ill. 532.

By the contract under which appellee claims it agreed, in certain contingencies, to advance moneys to pay taxes, and any payment of taxes by appellee under this stipulation would be deemed a payment by appellant and not by appellee.

Do the facts of this case call for the application of the doctrine of laches? While the right to bring this suit was complete seventeen years before this bill was filed, still the bill alleges (*Record, p. 49*), and the demurrer admits, that appellant "did not know until recently that said lease was null and void," and that it had violated the law and exceeded its powers, and for this reason suit has not been previously brought. In 1886 it became settled for the first time by the decision of this court in the *Alton* case, that appellee, by the laws of Indiana, had no power to accept the lease in controversy, and within a year from that decision the appellant brought this suit to cancel the lease. It may be that ordinarily the party can not excuse himself by pleading ignorance of the law. But this principle has no application here, if this lease is void solely because of the incapacity of appellee. In such case appellant's ignorance was of fact, not of law, since its own powers depended on appellee's powers under foreign law. What that foreign law in fact was, appellant discovered for the first time by the decision in the Alton

case, and, upon that case, it now relies. It seems to us, therefore, if the rule of laches is ever applied against the public, the facts here do not call for its application.

Respectfully submitted,

LYMAN TRUMBULL,
HENRY S. ROBBINS,
PERRY TRUMBULL,
(With JOHN M. BUTLER),
Of Counsel for Appellant.

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SUPREME COURT
OF THE
UNITED STATES.

THE ST. LOUIS, VANDALIA AND TERRE HAUTE RAILROAD COMPANY,
Appellant,
vs.
THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY,
Appellee.

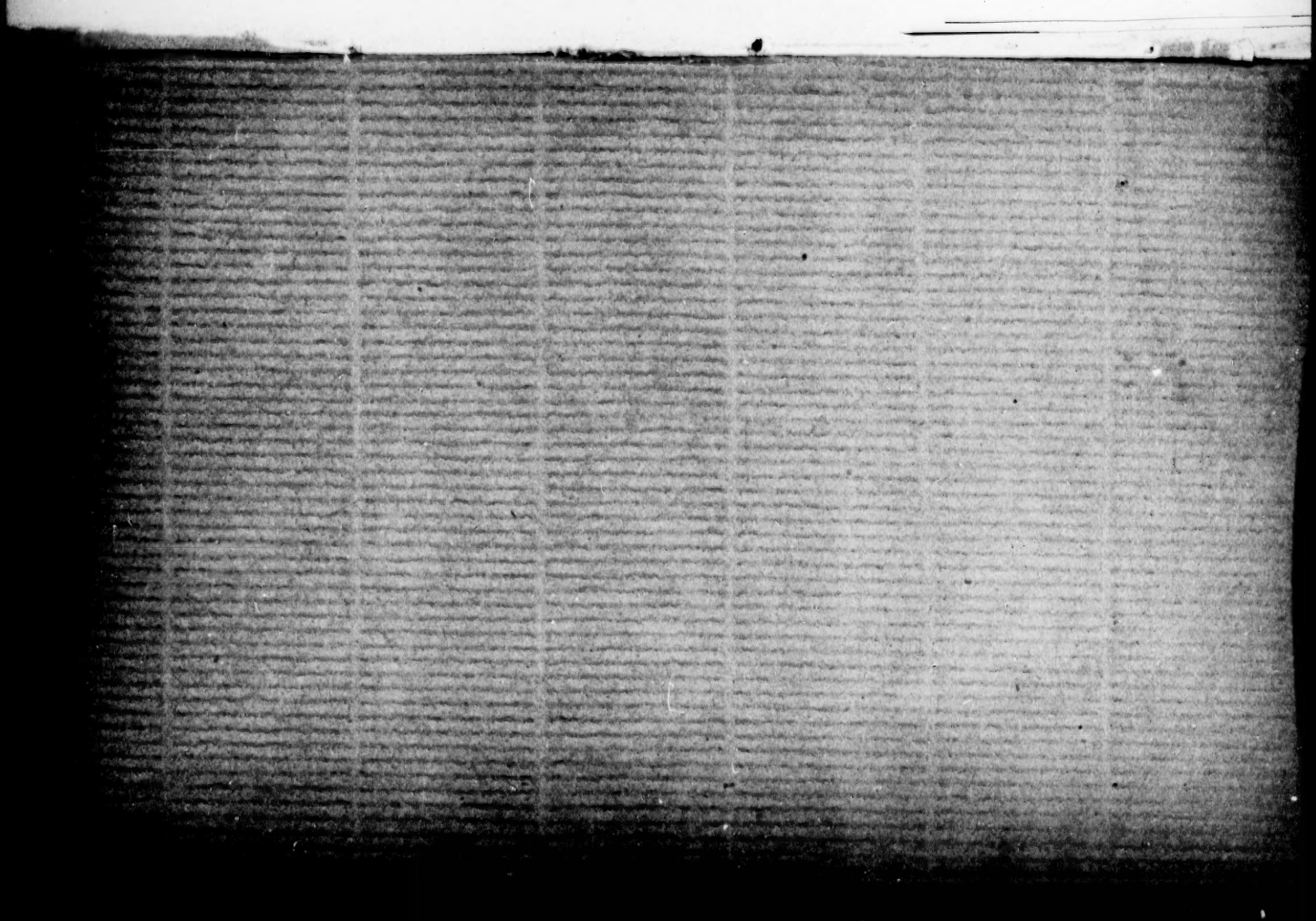
No. 344.
October Term, 1890.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

BRIEF IN BEHALF OF APPELLANT.

BY JOHN M. BUTLER.

FRANK H. SMITH, INDIANAPOLIS



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BRIEF IN BEHALF OF APPELLANT.

STATEMENT.

This cause involves the validity of a *lease*, identical in character, and legal effect, with the instrument held *void* by this Court in *Pennsylvania Railroad Company, et al.* v. *St. Louis, Alton and Terre Haute Railroad Company*, 118 U. S., 290. In that cause the lease was for a period of *ninety-nine years;* in the cause at bar the lease was for the period of *nine hundred and ninety-nine years.*

The St. Louis, Vandalia and Terre Haute Railroad Company was created a corporation by a Special Act of the General Assembly of the State of Illinois, approved February 10, 1865. Its charter was amended and enlarged by another Special Act, approved February 8, 1867. Both of these Special Acts appear in full in the record. (Record pp. 53, 55.)

By these acts, constituting its charter, appellant was empowered to locate, construct and maintain a railroad from a point on the east bank of the Mississippi River, opposite St. Louis, running thence eastwardly, through Greenville and Vandalia, to a point on the eastern boundary line of the State of Illinois deemed most convenient and practicable for extending the same to Terre Haute, in the State of Indiana.

It is very certain that neither of these Special Acts, either in express terms or by implication, gave to appellant power to lease its railroad and franchises to, or by any other contract or conveyance, vest the use, possession and control of its entire corporate property and rights in, a foreign corporation.

The Terre Haute and Indianapolis Railroad Company, appellee herein, was created a corporation, under the name of the Terre Haute and Richmond Railroad Company, by a Special Act of the General Assembly of the State of Indiana, approved January 26, 1847. By its charter appellee was empowered to locate, construct and maintain a railroad from a point on the west boundary line of the State of Indiana, running thence eastwardly, through Terre Haute, Greencastle and Indianapolis, to Richmond, in the State of Indiana.

Afterwards the General Assembly of the State of Indiana, by another Special Act, approved March 6,

1865, changed the name of said corporation to the Terre Haute and Indianapolis Railroad Company, and extended the time within which appellee might complete its railroad from Terre Haute to a point on the western line of the State of Indiana.

Both of these acts of the Legislature of the State of Indiana appear in full in the record.

(Record pp. 64, 71.)

Neither of these Acts, either in express terms or by implication, gave to appellee power to become *lessee* of the railroad and franchises of a foreign corporation, or to *accept*, by any other contract or conveyance, the possession and control of the railroad and franchises of a foreign corporation.

On February 10, 1868, appellant as lessor, and appellee, as lessee, entered into and executed the following agreement of

LEASE.

"WHEREAS, A contract for the construction and equipment of the St. Louis, Vandalia and Terre Haute Railroad, belonging to a corporation of the State of Illinois, has been entered into this day, by which arrangements have been made to complete and equip said road between East St. Louis and the State line of Indiana, in the manner set forth in said contract;

"AND WHEREAS, The Terre Haute and Indianapolis Railroad Company, as a corporation of the State of Indiana, has proposed to construct, without delay, a first class railroad, being an extension of their present road, from Terre Haute to the State line of Indiana, upon such location as will connect properly and directly with the St. Louis, Vandalia and Terre Haute Railroad at the State line of Illinois;

"AND WHEREAS, It is desirable that the said lines, when connected, should be operated by the Terre Haute and Indianapolis Railroad Company as one road between Indianapolis and St. Louis, and the said Terre Haute and Indianapolis Railroad Company having proposed to LEASE and operate the said St. Louis, Vandalia and Terre Haute Railroad for a period of nine hundred and ninety-nine (999) years,

"IT IS THEREFORE AGREED, FIRST, That upon completion of the road between East St. Louis and the State line of Indiana, the Terre Haute and Indianapolis Railroad Company shall take charge of, and operate the same with its equipment, for a period of nine hundred and ninety-nine (999) years, for which they shall be allowed sixty-five (65) per cent. of the gross receipts from all traffic moved over the line or business done thereon, and from the property of the company, as a consideration for working and maintenance expenses, the remaining thirty-five (35) per cent. to be appropriated as follows:

"1st. To the payment of interest on the first and second mortgage bonds of the St. Louis, Vandalia and Terre Haute Railroad Company, according to their legal priority.

"2d. All the surplus of said thirty five (35) per cent. to be paid over to the St. Louis, Vandalia and Terre Haute Railroad Company (semi-annually), to be disposed of by it for the benefit of its stockholders.

"If the thirty-five (35) per cent. should, from any cause, not be sufficient in amount to protect the interest on mortgage bonds and sinking funds therefor, as they mature from time to time, together with the payment of taxes and proper cost of maintaining organ-

ization, so that the rights of stockholders may be preserved, then, and in that event, the LESSEE shall advance for the company whatever amounts may be needed, to be accounted for under the yearly averages of THIS LEASE during the contract.

"IT IS FURTHER AGREED, That the Terre Haute and Indianapolis Railroad Company, AS LESSEE, shall enjoy all the rights, powers and privileges of the St. Louis, Vandalia and Terre Haute Railroad Company, so far as the same may be needful to maintain and operate said railroad; and to impose and collect tolls and rates for transportation, and to do all other acts and things as fully and effectually as the said St. Louis, Vandalia and Terre Haute Railroad Company could do if operating said line; it being always understood and agreed that the gross proceeds from through or joint traffic or business shall be divided on the *pro rata* basis per mile for distances moved on the roads of each party.

"IN WITNESS WHEREOF, the parties, respectively, have hereunto affixed this, the tenth (10th) day of February, A. D. one thousand eight hundred and sixty-eight, their official signatures and seals, under the authority of their Boards of Directors.

"Sealed and delivered in presence of:

E. F. WINSLOW.

"The St. Louis, Vandalia and Terre Haute Railroad Company, by, J. F. ALEXANDER,

[SEAL. ST. L. V. & T. H. R. R. CO.] President.

"The Terre Haute and Indianapolis Railroad Company, by, W. R. McKEEN,

[SEAL. T. H. & I. R. R. CO.] President."

(Record pp. 44, 45.)

On January 12, 1869, appellant entered upon its corporate record a resolution by which it purported to change the terms of the lease of February 10, 1868. This change was made after appellant's mortgage bonds aggregating $4,500,000, secured by its first and second mortgages, had been issued. The resolution is in the words and figures following, to-wit:

"GREENVILLE, ILLINOIS, January 12, 1869.

"WHEREAS, At the time of the execution of the LEASE of the St. Louis, Vandalia and Terre Haute Railroad to the Terre Haute and Indianapolis Railroad Company, to-wit:

"On the 10th. day of February, 1868, it was agreed and understood that the amount to be allowed to the last named company, for operating the said road, should be seventy (70) per cent. of the gross receipts, instead of sixty-five (65) per cent., as it now stands in said LEASE; therefore,

"RESOLVED, That the President be and he is hereby authorized to change the terms of said LEASE, so that when the said sixty-five (65) per cent. occurs therein it shall be read seventy (70) per cent., and that the said Terre Haute and Indianapolis Railroad Company shall be allowed seventy (70) per cent. of the gross receipts from all traffic moved over the line of said road, or business done thereon, in the same manner as if it were so provided in the said original LEASE; but if the working and maintenance expenses of said road shall be less than seventy (70) per cent. of the gross receipts aforesaid, then all of such excess shall be paid over to the St. Louis, Vandalia and Terre Haute Railroad Company. A true copy. WILLIAMSON PLANT,

Secretary."

(Record pp. 90, 91.)

Under this pretended lease, and modifying resolution, appellee entered into possession, and assumed complete control and use, of appellant's entire railroad, equipment and corporate franchises, and still retains exclusive possession, control and use thereof.

At the time of the execution and delivery of this pretended lease, there was in full force in the State of Illinois a law, approved February 16, 1865, of which the following is a copy:

"SECTION 1. Be it enacted by the people of the State of Illinois represented in the General Assembly, That it shall not be lawful for any railroad company of Illinois or for the directors of any railroad company of Illinois to consolidate their road with any railroad out of the State of Illinois, or to lease their road to any railroad company out of the State of Illinois, or to lease any railroad out of the State of Illinois, without having first obtained the written consent of all of the stockholders of said roads residing in the State of Illinois, and any contract for such consolidation or lease which may be made, without having first obtained said written consent, signed by the resident stockholders in Illinois, shall be null and void: Provided, That it shall be lawful for the directors of any railroad company created by the laws of this State to contract for the use and operation of any railroad connecting with their line beyond the limits of the State, and in all contracts for the use and operation of any railroad by another corporation it shall be lawful for the parties to provide for the use of any of the powers and privileges of either or both of the corporations parties thereto: And provided, further, That nothing in this act shall be so construed as to authorize the consolidation of any of said

railroads with railroads out of the State of Illinois: Provided, That nothing contained in the first proviso to this act shall in anywise apply to or be taken advantage of by the Great Western Railroad Company (of 1859), a corporation of the State of Illinois.

"SEC. 2. This act shall take effect and be in force from and after the passage thereof.

"Approved February 16, 1865." (Record, p. 91.)

When this pretended lease was executed, and possession taken by appellee thereunder, a large number of the stockholders of appellant corporation were residents of the State of Illinois.

No consent in writing to the execution of the pretended lease was obtained from any, or either, of appellant's stockholders then residing in the State of Illinois; nor did the stockholders of appellant ever, at any time, at any stockholders' meeting, authorize, confirm, or ratify the execution of the pretended lease to appellee.

On April 26, 1886, this Court, in *Penn. R. R. Co. et al.* v. *St. L. A. & T. H. R. R. Co.*, *supra*, decided that railroad corporations of the State of Indiana have no power, under their charters and the general laws of Indiana, to become *lessees* of the railroads and franchises of railroad corporations of other States; or to *accept*, by any other contract or conveyance, the possession and control of the railroads and corporate franchises of foreign corporations; and *held* a lease, or instrument, identical in purpose and effect with the lease here involved, *ultra vires, absolutely void, illegal and opposed to public policy.*

On November 4, 1886, this decision was affirmed, and the petition for rehearing was overruled.

It is part of the history of Indiana that, up to the time the decision of this court above referred to was announced, it was the general belief that railroad corporations of Indiana did possess corporate power to become lessees of, and take possession and control of, railroads and franchises of corporations of adjoining States. This is evidenced by the fact that, up to that time, several of the most important lines of railroad reaching St. Louis and Chicago were in the possession and control of Indiana railroad corporations *as lessees*. Since the announcement of that decision many millions of dollars worth of railroad property in the States of Indiana, Illinois and Ohio have changed ownership, and have been reorganized for the express purpose of meeting the requirements of the law as announced by the decision of this Court.

On July 6, 1887, appellant filed its original bill in this cause, seeking the cancellation of the lease to appellee—an Indiana corporation; an accounting for the use and income of appellant's railroad, equipment and franchises while held by appellee; and the restoration to appellant of its franchises, equipment and property. In the original bill alternative relief was prayed in event that the Court might hold the lease to appellee valid. This original bill appears in the record.

(Record, pp. 1 to 16.)

Appellee demurred to the original bill alleging the following causes of demurrer: Want of equity; complete remedy at law; laches; and multifariousness and inconsistency. (Record p. 36.)

The Circuit Court sustained the demurrer upon each of these grounds, rendering a written opinion which appears in full in the record, and which will be hereinafter considered. (Record, pp. 94 to 102.)

By leave of Court appellant, for the purpose of avoiding any possible question of multifariousness or inconsistency, amended its bill by eliminating therefrom that part of the prayer, and all averments, by which alternative relief,—in event the Court should hold the pretended lease legal and valid,—was sought. The questions presented by this appeal, arise solely from the appellant's amended bill. The following is a brief

SYNOPSIS OF THE AMENDED BILL.

1. It avers the citizenship of appellant,—a corporation of Illinois; and of appellee,—a corporation of Indiana.

2. That appellant was created a corporation by two Special Acts of the General Assembly of the State of Illinois, approved February 10, 1865, and February 8, 1867,—setting forth said acts as exhibits. That appellant was empowered to locate, construct and maintain a railroad from the bank of the Mississippi River opposite St. Louis, eastwardly to a point on the eastern boundary line of Illinois most convenient for extending the same to Terre Haute, Indiana, and possessed the usual powers, privileges and franchises conferred upon railroad corporations.

But that appellant was not empowered by either of said Special Acts, or by any rights, powers and franchises given to or exercised by railroad corporations of the State of Illinois, to lease this railroad, or by any other contract or conveyance to part with the possession, control and use of its property and franchises, or to deprive itself of, and vest in others, the power of control in the management of its road and property, and in the exercise of its franchises, indefinitely, or for any fixed period of time.

3. That appellee was created a corporation under the name of the Terre Haute and Richmond Railroad Company, by a Special Act of the General Assembly of the State of Indiana, approved January 26, 1847, and was empowered to locate and construct a railroad, commencing at a point on the western boundary line of Indiana, running thence eastwardly through Terre Haute, Greencastle and Indianapolis, to Richmond,—all in the State of Indiana. That afterwards, by an act approved March 6, 1865, the name of appellee was changed to the Terre Haute and Indianapolis Railroad Company, and further time was given to appellee for the completion of its railroad from Terre Haute to a point on the western boundary line of Indiana. These acts are set forth as exhibits.

That appellee was not authorized by either of said acts or by any law of the State of Indiana to make, execute or accept any lease, contract or conveyance by which it should acquire or obtain, either indefinitely or for a fixed term, the possession, management or control of any railroad located beyond the limits of said State of Indiana.

4. That on or about July 1, 1870, appellant completed its railroad from East St. Louis to a point on the eastern boundary of Illinois,—the length of said railroad being one hundred and fifty-eight miles,—and fully equipped the same with all necessary locomotives, cars and other equipment and machinery.

5. That for the purpose of constructing its railroad, appellant, on April 6, 1867, executed its first mortgage, bearing date January 1, 1867, to secure the payment of bonds aggregating $1,900,000, payable thirty years thereafter.

That by said mortgage it was provided that begin-

ning on July 1, 1872, there should be set apart and appropriated out of the earnings of said railroad and paid to a Commissioner duly appointed the full sum of twenty thousand dollars ($20,000) as a sinking fund for the redemption, payment and cancellation of said bonds secured by said mortgage. This mortgage is set forth in full in the bill, as an exhibit.

6. That, for the purpose of completing the construction of its railroad and procuring equipment therefor, appellant, on March 13, 1868, executed its second mortgage to secure the payment of bonds aggregating $2,600,000, payable thirty years after May 1, 1868.

This mortgage is set forth in full in the bill, as an exhibit.

7. That said mortgages were duly recorded in all of the Counties into or through which appellant's railroad extends. That bonds secured thereby aggregating $4,500,000 were duly issued and sold for value. That none of said bonds have been paid. That there never has been created, nor is there now existing, any sinking fund whatever, as provided and required by said mortgage of January 1, 1867.

8. That, prior to the completion of its railroad, appellant, on February 10, 1868, by its president, acting under authority which the then board of directors of appellant assumed or attempted to confer upon him, executed and delivered to appellee a pretended lease of all of appellant's railroad, equipment and franchises for the period of *nine hundred and ninety-nine years.*

NOTE.—The lease of February 10, 1868, and the resolution of January 12, 1869, modifying the same, herein before set forth, are set out in full in the eighth clause of the amended bill. (Record, pp. 44, 45.)

9. That by the act of the General Assembly of the State of Illinois, approved February 16, 1865,—which act is hereinbefore in full set forth,—it was not lawful for appellant corporation to consolidate its railroad with any railroad out of the State of Illinois, or to lease its railroad to any railroad company out of the State of Illinois, without having first obtained the written consent of all its stockholders residing in the State of Illinois.

That at the time of the execution of the pretended lease a large number of the stockholders of appellant were residents of Illinois. The amended bill then sets out the names, and places of residence, of fifty-nine of appellant's stockholders, who were then residing in Illinois, and avers that not one of said resident stockholders ever, at any time, consented, in writing, to the execution of said pretended lease; and that the stockholders of appellant never, at any stockholders' meeting, held either before or subsequent to the execution of said pretended lease, authorized, confirmed or ratified the execution thereof.

10. That immediately upon the completion and equipment of appellant's railroad, the appellee, on or about July 1, 1870, claiming the right so to do under said pretended lease, took complete possession and control of all of appellant's railroad, equipment, machinery and franchises, and has ever since retained, and still retains, the exclusive possession, control and use thereof, and is now exercising, and claiming the right to exercise all the powers, privileges and franchises of appellant as a railroad corporation. That appellee, during its possession and use of appellant's railroad and franchises, has received from tolls and other receipts of appellant's property and franchises more than $21,000,000.

11. That appellee in accepting said pretended lease and in taking possession of and operating appellant's railroad and franchises, exceeded the powers and rights conferred upon it by its charter and the laws of the State of Indiana, and acted wholly without authority of law or right.

That appellant at the time of the execution of said pretended lease, had no power or authority to execute a lease of its property as in said pretended contract contemplated. That appellant by its charter and the laws of Illinois, had no power or authority to make any conveyance or contract whereby it could for a term of years, or indefinitely, part with the possession, control and use of its property and franchises, or whereby it could transfer to appellee or any other non-resident corporation, all its rights, powers and privileges conferred upon it as a corporation of the State of Illinois. That said pretended lease for *nine hundred and ninety-nine years* is an attempt on the part of appellant to divest itself of the entire possession and control of its property, privileges, powers and franchises for such a period of time as virtually amounts to a transfer in perpetuity, and to an absolute surrender of its property and franchises to a corporation foreign to the State of Illinois. That such action incapacitates appellant from fulfilling those duties and obligations to the State of Illinois and the inhabitants thereof which are imposed upon it by the acceptance of its charter, which appellant could not lawfully do.

That even if appellant could lawfully have executed such a contract as said pretended lease, the said pretended lease was not executed in the manner in which alone such a lease could be executed under the laws of

the State of Illinois, and that said pretended lease or contract is absolutely null and void, and in no way binding upon appellant or appellee.

12. That by taking possession of appellant's railroad and franchises without right as aforesaid, appellee became in equity the *trustee* of appellant, and as such was and is liable in equity to account to appellant for all of said property and the profits. issues, tolls and receipts thereof, collected or received by appellee during its possession, control and management of appellant's railroad and franchises; and to restore immediately all of said property to the control and possession of appellant, after deducting therefrom appellee's reasonable disbursements in and about the care, management and maintenance of appellant's railroad and property.

That appellee is also liable to appellant for such further sum as shall be the fair value of so much of appellant's property as said appellee has no longer in its possession or control.

13. That appellant has at various times requested appellee to surrender and turn over to appellant its railroad, equipment and franchises, but appellee has refused and still refuses so to do, and insists upon the validity of said pretended lease, and upon its right, during the entire period mentioned in said lease, to retain exclusive possession and control of appellant's railroad and franchises, so unlawfully obtained and held, and to receive the income derived therefrom. That because appellee has possession and control of all of appellant's corporate property and franchises, and appellant has no other source of revenue, appellant has been unable to apply any money whatever to the creation of a sinking fund, as required by appellant's first mortgage of January 1, 1867.

14. That when said pretended lease was executed by appellant's President and Board of Directors, said Board of Directors supposed that they had the lawful right to execute the same. That appellant did not know until recently that said lease was null and void, and that appellant by the execution thereof had violated the law and exceeded its powers, and for this reason appellant has not heretofore instituted legal proceedings, but that appellant has been recently advised by its counsel that said pretended lease is null and void, and that it is the duty of appellant at once to repudiate the same, and to resume possession, control and use of its property and franchises, and thereby at once place itself in a position to perform and discharge the duties and obligations to the public assumed by the acceptance of its charter.

15. That great and irreparable injury will be done appellant and its stockholders unless it be immediately restored to the possession, control and use of its property and franchises. That by the execution of said pretended lease it has rendered itself liable to have its charter and corporate rights taken from it by the State of Illinois. That its railroad and property is of great value, exceeding $8,500,000, and yields a large income, which income, under proper management, could be largely increased. That the present net income of said railroad is more than sufficient to pay the interest on its bonded indebtedness and comply with the requirements of its mortgage of January 1, 1867, concerning the creation of a sinking fund, but that by reason of the failure to provide for a sinking fund the bondholders under said first mortgage may at any time institute foreclosure proceedings, and thereby throw the

affairs of appellant into great confusion and bring appellant into a state of insolvency.

That said *ultra vires* contract gives appellant no means of enforcing its provisions against said appellee, and that to allow appellee to avail itself of said *ultra vires* contract, which can not be enforced against it, is doing appellant an irreparable injury.

16. That the protection and enforcement of appellant's rights in the premises, require the taking of an account between appellant and appellee of the moneys received by appellee in the operation of appellant's railroad property. That such an accounting will require the investigation of long and complicated accounts, covering a period of nearly seventeen years, and involving a great many separate items of account. That appellant is also entitled to have appellee account for the property of appellant so taken by appellee under said pretended lease. That a Court of law affords no adequate means for the taking of either of such accounts. That said pretended lease is, and unless delivered up and cancelled, will continue to be a cloud upon the title of the appellant to its property. That such cloud is liable to seriously embarrass appellant in the ownership and use of its property, and that a Court of law has no jurisdiction adequate to direct a surrender and cancellation of said pretended lease.

That appellee is a non-resident of this District and State and has no property therein out of which appellant could procure satisfaction of any decree or judgment obtained against it. That large sums of money are daily accruing and being collected by the appellee from the operation of appellant's road, which sums so collected are being withdrawn by appellee from the

jurisdiction of this Court. That appellee will continue, during the litigation concerning said pretended lease, to collect and appropriate to its own use and withdraw such large sums of money as accrue during said litigation from the jurisdiction and process of this Court, to the great and irreparable injury of appellant, unless the possession of said railroad and property shall be restored to appellant, and unless appellee shall be restrained from further interfering therewith by the injunction of this Court, or unless a Receiver shall be appointed to take possession and control of said property and receive the tolls and income thereof *pendente lite.*

The prayer of the amended bill is:

1. For the cancellation and surrender of the pretended lease.

2. For the surrender to appellant by appellee of the property and equipment received under said pretended lease, or so much thereof as is still in appellee's possession, and that appellee be perpetually enjoined from further interfering with or disturbing appellant in its possession, use and control of its railroad, equipment and franchises.

3. That an account may be taken of all moneys received by appellee, or which it might have received by due skill and diligence from the use of said railroad and property while in its possession, together with an account of the reasonable expenses of appellee in the operation and maintenance of said railroad and property, and that appellee may be decreed to pay to appellant the amount found to have been received by it, together with the fair value of such of appellant's

property as shall not be delivered by appellee to appellant, less appellee's reasonable disbursements and expenses.

4. For a temporary injunction restraining appellee from interfering with the control and management of said railroad, *pendente lite*, or for a Receiver, *pendente lite*.

5. For general relief.

The amended bill and exhibits appear in the record on pages 38 to 92 inclusive.

Appellee demurred to the amended bill, assigning as causes of demurrer:

1. Want of equity. 2. Complete remedy at law. 3. Laches. (Record, p. 92.)

The Circuit Court sustained the demurrer on each of the three grounds stated therein, without rendering any additional opinion in writing, and without modifying the written opinion rendered on the hearing on demurrer to appellant's original bill.

ASSIGNMENT OF ERRORS.

1. The Circuit Court erred in sustaining appellee's demurrer to appellant's bill of complaint as amended.

2. The Circuit Court erred in dismissing appellant's bill of complaint as amended. (Record, p. 105.)

ARGUMENT.

Three questions are presented for consideration and decision, namely:

1. *Has a court of equity jurisdiction upon the facts stated in appellant's amended bill; or is appellant's remedy solely at law?*

2. *Has appellant's laches wrought an estoppel in favor of appellee?*

3. *Is equity shown by appellant's amended bill?*

These questions will be discussed in the above order.

I.

EQUITY JURISDICTION IS COMPLETE AND PERFECT IN THIS SUIT, AND THE REMEDY AT LAW IS NOT PLAIN, CERTAIN, COMPLETE OR ADEQUATE FOR THE FOLLOWING REASONS, TO-WIT:

IT IS A SUIT FOR THE CANCELLATION OF A LEASE CLAIMED BY APPELLANT TO BE ULTRA VIRES, ILLEGAL AND ABSOLUTELY VOID.

IT IS A SUIT TO REMOVE A CLOUD FROM THE TITLE OF APPELLANT TO ITS RAILROAD AND FRANCHISES.

IT IS A SUIT FOR AN ACCOUNTING TO RECOVER THE VALUE OF THE USE OF APPELLANT'S RAILROAD AND PROPERTY WHILE HELD IN POSSESSION AND USE BY APPELLEE.

IT AVOIDS A MULTIPLICITY OF SUITS,—HENCE EQUITY HAS FULL JURISDICTION.

THE SUIT HAS IN IT AN ELEMENT OF TRUST. APPELLEE, WHILE ILLEGALLY HOLDING AND USING APPELLANT'S RAILROAD AND PROPERTY, MAY WELL BE HELD A TRUSTEE FOR APPELLANT AS TO THE EARNINGS OF THE RAILROAD AND THE VALUE OF ITS USE WHILE SO ILLEGALLY HELD.

1. *Equity jurisdiction is complete because the suit is brought to compel appellee to cancel and deliver up a lease which on its face purports to be legal and valid, but which is in fact ultra vires, illegal and void,—and to remove a cloud from appellant's title to its railroad, equipment and franchises.*

"In cases where the agreements or other transactions are repudiated on account of their being against

public policy, the circumstance, that the relief is asked by a party who is *particeps criminis*, is not in equity material. The reason is, that the public interest requires that relief should be given; and it is given to the public through the party. And in these cases relief will be granted not only by setting aside the agreement or other transaction, but, also, by ordering a repayment of any money paid under it. * * *

"Whatever may have been the doubts or difficulties formerly entertained upon this subject, they seem by the more modern decisions to be fairly put at rest; and the jurisdiction is now maintained in the fullest extent. And these decisions are founded on the true principles of equity jurisprudence, which is not merely remedial, but is also preventive of injustice. If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it; since he can only retain it for some sinister purpose. If it is a negotiable instrument, it may be used for a fraudulent or improper purpose, to the injury of a third person. If it is a deed purporting to convey lands or hereditaments, its existence in an uncancelled state necessarily has a tendency to throw a cloud over the title. * * *

"The whole doctrine of courts of equity on this subject is referable to the general jurisdiction, which it exercises in favor of a party, *quia timet*. It is not confined to cases where the instrument, having been executed, is void upon grounds of law or equity. But it is applied, even in cases of forged instruments, which may be decreed to be given up without any prior trial at law on the point of forgery."

Story's Equity Jurisprudence, Redfield's Edition, Sections 298, 700 and 701.

"Even where the contracting parties are *in pari delicto* the Courts may interfere from motives of public policy. Whenever public policy is considered as advanced by allowing *either party to sue for relief against the transaction*, then relief is given to him. In pursuance of this principle, and in compliance with the demands of a high public policy, equity *may* aid a party equally guilty with his opponent, not only by cancelling and ordering the surrender of an executory agreement, but even by setting aside an executed contract, conveyance, or transfer, and decreeing the recovery back of money paid, or property delivered in performance of the agreement. The cases in which this limitation may apply, and the affirmative relief may be thus granted, include the class of contracts which are intrinsically contrary to public policy—contracts in which the illegality itself consists in their opposition to public policy, and any other species of illegal contracts, in which, from their particular circumstances, incidental and collateral motives of public policy require relief."

Pomeroy's Equity Jurisprudence, Vol. II, Section 941.

"The jurisdiction of equity to grant the remedy of cancellation exists, and will always be exercised when it is necessary to protect and maintain equitable primary estates, interests or rights; * * * A doubt was formerly entertained as to whether a court of equity ought to exercise its jurisdiction to order instruments absolutely void at law, and not merely voidable, to be delivered up and cancelled, since the legal remedy of a party was adequate and complete, and no case was presented for equitable interference; but it is now well settled that jurisdiction will be exercised in such cases,

except where the invalidity of the instrument is apparent on its face. The particular instances in which this remedy is most often given, are instruments concerning land, and negotiable paper before maturity, the legal remedies in these cases being, as a general rule, inadequate. * * *

"The jurisdiction of courts of equity to remove clouds from title is well settled; the relief being granted on the principle of *quia timet*, that is, that the deed or other instrument or proceeding constituting the cloud may be used to injuriously or vexatiously embarrass a plaintiff's title."

Pomeroy's Equity Jurisprudence Vol. III. Sections 1377 and 1398.

In *New Castle Northern Ry. Co.* v
Rep. 537, it is said:

"There can be no doubt that a c
entertain a bill to avoid a contract
which it had no power to make.
fraud involving a breach of trust, or
of duty, *or a violation of public polic*
ground for equitable interposition fo
of agreements. Where there is frau
policy, a court of equity will rescind
the party plaintiff has participated
policy would be defeated by allowing
stand. And so long as the contract
tory, the maxim '*in pari delicto*' does

Trustees of Auburn Academy v. *Strong*, Hopkins Ch. (N. Y.) 278, 282, was a bill in equity to obtain relief from an *ultra vires* contract with a teacher.

The Court said: "The question then arises, what is the jurisdiction of this Court in this case? It has no

power of visitation; but it has power to cause contracts to be cancelled; and on that ground, it has cognizance of this cause. Injunction granted."

In *Spring Co.* v. *Knowlton*, 103 U. S., 59, 60, it is expressly held that in case of illegal and void executory contracts, the maxim, *in pari delicto*, does not apply. In the decision Mr. Justice Woods says:

"In *Thomas* v. *City of Richmond*, (12 Wall. 349,) this Court cites with approval the note of Mr. Frere to the case of *Smith* v. *Bromley*, (2 Doug. 696,) to the effect that a recovery can be had as for money had and received when the illegality consists in the contract itself, and that contract is not executed; in such case there is a *locus penitentiae*; the *delictum* is incomplete; *the contract may be rescinded by either party.*

"The rule is applied in the great majority of cases, even when the parties to the illegal contract are *in pari delicto*, the question which of the two parties is the more blamable being often difficult of solution and quite immaterial."

In *Mellen* v. *Moline Iron Works*, 131 U. S., 367, Mr. Justice Harlan said: "The removal of alleged liens or incumbrances upon property, the closing up of affairs of insolvent corporations, and the administration and distribution of trust funds, are subjects over which courts of equity have general jurisdiction."

In *Gage* v. *Kaufman*, 133 U. S., 471, which was a suit in equity to remove the cloud upon title created by an invalid tax deed, Mr. Justice Gray said: "Upon general principles, and by the Illinois decisions, as the tax deeds appear upon their face to be clouds upon the plaintiff's title, a bill in equity is the proper form of obtaining relief upon the various grounds alleged."

The following authorities are also in point in support of the proposition under discussion:

Hamilton v. *Cummings*, 1, Johnson's Ch. (N. Y.) 517, 521, 522, 523; *Piersoll* v. *Elliott*, 6 Peters (U. S.) 99, 100; *Holland* v. *Challen*, 110 U. S., 20, 24; *McConihay* v. *Wright*, 121 U. S., 205, 206.

In addition to the American authorities above quoted and cited the attention of the Court is called to the following English authorities, as further supporting the proposition under consideration.

In *Debenham* v. *Ox*, 1 Vesey, Sr., 276, the Court said: "The plaintiff (is) *particeps criminis*: so that if it had not been for the ingredient of public policy, he could hardly have come here for relief. In all those cases, the Court sets (agreements) aside, not for the party's sake, but for the benefit of the public." * * "Because the objection, that infects the bond, arises from public consideration, the Court will relieve."

In *Lord St. John* v. *Lady St. John*, 11 Vesey, Jr., 535, Lord Eldon, Chancellor, said: "Next, is (the agreement) to be delivered up? * * * I have lately had occasion to deliver my opinion, that the decision of a Court of law, that, upon grounds of policy, or for other reasons, an action will not lie, does not destroy the old jurisdiction of the Court; particularly where the instrument is void upon grounds of policy. If it is void in law, there is no doubt, that, being against the policy of the law, this Court would order it to be delivered up. * * * The authorities go to this, that where the transaction is against policy, it is no objection that the plaintiff himself was a party in that transaction which is illegal. In *Shirley* v. *Ferrers*, in the Court of Exchequer,

a few years ago, the case of a marriage brocage bond, the plaintiff was a party to the transaction, *particeps criminis;* but the Court held that where the relief is upon the policy of the law, that is not material; the public interest requires that the relief should be given; and it is given to the public through that party."

In the case of *Smith* v. *Bruning*, 2 Vernon, 392, the full report of the case is: "The Court not only decreed a marriage brocage bond to be delivered up, but a gratuity of fifty guineas actually paid to be refunded."

In *Woodroffe* v. *Farnham*, 2 Vernon, 292, a note given between apprentices for money won at gaming was decreed "to be delivered up and cancelled."

In *Drury* v. *Hooke*, 1 Vernon, 411, the report reads: "The bill was to be relieved against a marriage brocage bond; and it appearing that the marriage was brought about without the consent of the young woman's parents, who were then living, the Lord Chancellor, for that reason alone, decreed the bond to be delivered up."

To the same general effect are: *Reynell* v. *Sprye*, 1 De G. M. & G., 660,679, *per* Knight Bruce, L. J.; *Benyon* v. *Nettlefold*, 3 Macn. & G., 94, 102, 103; *Cullingworth* v. *Loyd*, 2 Beav., 385, 390; *McNeill* v. *Cahill*, 2 Bligh, 228; *Estabrook* v. *Scott*, 3 Ves., 456; *Hatch* v. *Hatch*, 9 Ves., 292, 298; *Rider* v. *Kidder*, 10 Ves., 360, 366; *Hill* v. *Spencer*, Ambl., 641; *Morris* v. *MacCullock*, 2 Eden, 190, Ambl., 432; *Goldsmith* v. *Buning*, 1 Eq. Cas. Abr., 89; *Roberts* v. *Roberts*, 3 P. Wms., 66, 74; *Smith* v. *Bromley*, cited 2 Dougl., 696, 697, 698.

It seems clear that equity jurisdiction is perfect to compel cancellation and delivery up of an illegal and void agreement, and that a party having entered into such illegal and void agreement may come into a court

of equity and ask the *affirmative relief* of having such illegal and void agreement cancelled and delivered up.

2. *Equity jurisdiction is always complete unless the remedy at law is plain, certain, complete and adequate.*

"The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is *as efficient* as the remedy which equity would confer under the same circumstances."

Kilbourn v. *Sunderland*, 130 U. S., 514.

"The adequate remedy at law, which is the test of equitable jurisdiction in these Courts, is that which existed when the Judiciary Act of 1789 was adopted, unless subsequently changed by act of Congress."

McConihay v. *Wright*, 121 U. S., 206.

"It is not enough that there is a remedy at law; it must be plain and adequate, or in other words, *as practical and as efficient* to the ends of justice and its prompt administration, as the remedy in equity."

Boyce's Executors v. *Grundy*, 3 Peters, (U. S.) 215.

Measured by these rules there can be no possible doubt but that the suit at bar is, not only properly but of necessity, of equitable jurisdiction.

1 Story's Eq. Juris. Secs. 32, 33. *Pomeroy's Eq. Juris.*, Vol. 1, Secs. 180, 217, 222; *Watson* v. *Sutherland*, 5 Wall., (U. S.) 78; *Oelrichs* v. *Spain*, 15 Wall, (U. S.) 228; *Van Norden* v. *Morton*, 99 U. S., 378, 380; *Crane* v. *McCoy*, 1 Bond, (U. S. C. C. Reps.) 422, 427; *Richardson* v. *The Vt. & Mass. R. R. Co.*, 1 Am. Ry. Reps., 115; *Wright* v. *Pitt*, 12 L. R. Eq. Cas., 408.

3. *Equity jurisdiction is complete because the bill demands an accounting.*

"There can not be any real doubt that the remedy

in equity, in cases of account, is generally more complete and adequate than it is or can be at law."

Kilbourn v. *Sunderland*, 130 U. S., 315.

In the case of *Richardson* v. *Vermont and Massachusetts R. R. Co.*, 44 Vt., 613; s. c. 1 Am. Ry. Reps., 115, which was an action by subscribers to the stock of the company to obtain the payment of certificates issued by the company agreeing to pay interest on subscriptions to stock out of future profits, the company being about to declare a dividend to stockholders, the Court said:

"The determination of the orators' rights might involve an accounting to ascertain the existence and extent of the claims of others standing in like condition with the orators, and also other investigations and inquiries into the condition of the corporation in various aspects, more appropriate for a court of chancery than for a jury in a court of law. The case is one proper for chancery jurisdiction; notwithstanding, in this particular case, the admission in the answer, of funds properly applicable to the payment of these claims, if valid, renders proof on these points unnecessary." See also:

1 Story's Eq. Juris., Secs. 442, 442a, 449, 450, 458, 459, 459a; *Pomeroy's Eq. Juris.*, Vol. 1, Sec. 112; Vol. 2, Sec. 940 and note 3; Vol. 3, Secs., 1416, 1420, 1421.

4. *Equity jurisdiction is perfect when its exercise will avoid multiplicity of suits.*

That this one suit in equity will prevent a multiplicity of suits,—even if appellant had an adequate remedy at law,—is very evident.

One of the grounds upon which the Circuit Court sustained appellee's demurrer is thus given in the written opinion filed in the cause:

"By this suit in equity the complainant seeks to

recover possession of real estate and quiet its title to the same. Ejectment is a legal and not an equitable remedy and ejectment will lie to recover the posession of a railroad. *Railroad* v. *Johnson*, 119 U. S., 608."

(Record, p. 102.)

From this statement the inference is irresistible that the Circuit Court regarded the corporate property of Illinois railroad corporations as consisting of *real estate* pure and simple.

The Constitution of the State of Illinois puts an emphatic negative upon this proposition:

"The rolling stock, and all other movable property belonging to any railroad company or corporation in this state, shall be considered *personal property*, and shall be liable to execution and sale in the same manner as the personal property of individuals, and the general assembly shall pass no law exempting any such property from execution and sale."

Sec. 10, Art. 11, Illinois Constitution.

Under this provision it is plain that a suit in ejectment,—which would only reach the *realty*,—would leave a very valuable portion of the corporate property of appellant untouched and unrecovered. In addition to the equipment and movable machinery, the *corporate franchises*,—which constitute a most valuable part of the corporate property,—are *personal property*. Would an ejectment suit reach them?

A careful examination of the decision in *Railroad* v. *Johnson*, 119 U. S., 608, cited by the Circuit Court in support of its holding, will show that it is not at all in point, and does not hold that the corporate property of railroad corporations is to be regarded as real estate. That was a suit for forcible entry and detainer brought

by a contractor who had built eighteen miles of the grade and track of the railroad of the Iron Mountain Company. The Company had taken forcible posession without paying the contractor. The decision of this Court is based upon the peculiar language of the statute of Arkansas relating to forcible entries and detainers. This statute,—which is set out in full in the decision,—extends the action of forcible entry and detainer and makes it applicable to "lands, tenements, *or other possessions.*" It can hardly be claimed that that decision supports the holding that the entire corporate property of Illinois railroad corporations can be recovered in ejectment suits.

Since the entire equipment and movable property, and the corporate franchises, of Illinois railroad corporations are *personal property*, a suit in ejectment, brought by appellant against appellee, would have to be supplemented by a suit in replevin for the personal property. After both of these suits were determined, the lease would still be a cloud over appellant's title, and the matter of accounting would still remain unlitigated. Hence there would finally have to be a suit in equity to remove the cloud upon the title, and to perfect settlement by full accounting. All this multiplicity of suits is avoided by this bill in equity.

In *Oelrichs* v. *Spain*, 15 Wall., (U. S.) 228, this Court said:

"If the injunction bonds were sued upon at law, and judgments recovered, a proceeding in equity would still be necessary to settle the respective rights of the several obligees to the proceeds. The direct proceeding in equity will save time, expense, and a multiplicity of suits, and settle finally the rights of all concerned in one litigation."

In the case of *South Carolina R. R.* v. *Steiner*, 44 Ga., 546; s. c. 3 Am. Ry. Reps., 86, in which several railway companies which had been granted the use of a street by a municipality, and were threatened with damage suits by the adjoining proprietors, sought to have their rights to the street determined against the adjoining proprietors, the Court said: "We hold, from the facts disclosed by the record, that equity may take jurisdiction by bill, in the nature of a bill of peace, under section 3166 of the Code, and bring all the parties, plaintiffs and defendants, into the forum, and adjust their several rights by one decretal verdict; and the inquiry upon the trial of such case will not only cover past, but future, damages, so as to estop all further or future litigation in or about the same subject-matter."

This point is fully supported by the following standard authorities:

1 Story's Eq. Juris., Secs. 32, 64k, 67, 456, 457, 518.

Pomeroy's Eq. Juris., Vol. 1, Secs. 243 to 275.

5. *Equity jurisdiction attaches where there is an element of trust in the case.*

In the case at bar appellee may well and properly be held a *trustee* for appellant, as to the entire income derived from appellant's railroad, equipment and franchises, while held and used by appellee under the illegal and void lease.

In *Oelrichs* v. *Spain*, *supra*, Mr. Justice Swayne used the following language:

"Besides, there is an element of *trust* in the case, *which*, whenever it exists, *always confers jurisdiction in equity.*"

In *Hardy* v. *Metropolitan Land and Finance Co.*,

Law Reps. 7 Ch. Appeals 427, the directors of a Building Society, without authority of act of Parliament and the rules of the Society, deposited 375 pounds with the defendant. A bill in equity was filed by the Society to recover this money. The defendant insisted "that the relief sought by the bill was in the nature of a mere money demand, and might be properly dealt with by a court of law." The Master of Rolls dismissed the bill because the remedy was at law. Upon appeal to the Court of Appeals in Chancery, the Court held the bill maintainable. Lord Justice James said:

"The only question is whether this was so clearly a mere money demand that the Court has no jurisdiction to deal with it, but must turn the plaintiffs away from its doors to seek their remedy elsewhere. At first it appeared to me that there was some difficulty on this point, but now it appears beyond all doubt that this money was money belonging to the London Building Society, and that it was not in accordance with the act of Parliament or their rules that it should be lent to or deposited with the Metropolitan Land Company. It was, therefore, trust money placed by an improper act of the Directors of the London Building Society in the hands of the defendants, and as they had never discharged themselves from it, *it is trust money* still in their hands. It is, therefore, in my opinion, open to the plaintiffs, finding this trust money in the hands of the defendants, to call upon them to pay it back. * * * I am of opinion that the Court has jurisdiction to order the money to be paid to the plaintiffs, and that their bill ought not to be dismissed on the technical ground that their remedy is in a court of law."

In the case of *Bryson* v. *Warwick and Birmingham*

Canal Company, 4 De Gex, Macnaghton and Gordon, 711, the facts were as follows:

The directors of a provisionally registered company agreed to buy the property of two canal corporations, in case the company obtained an act of incorporation, and deposited, as a forfeit, money withdrawn from another provisionally registered company, of which they were directors. They repaid the latter company from funds of the former company. The company was not incorporated and the forfeit was paid to the canal corporations. A shareholder of the first named company brought a suit in equity against the canal corporations to compel them to refund the forfeit money, and the Court ordered the money refunded.

Turner L. J. said (pages 750, 751):

"In my opinion, therefore, this suit is properly constituted and it is necessary to consider the second question raised by the appellant, whether the moneys with which the 10,000 *l.* was paid were affected by a trust for the railway company? It was insisted, on the part of the appellants, that they were not, because it was said that they were borrowed moneys, and that the members of the provisional committee had no power to borrow them; that they never became the moneys of the railway company, and that the plaintiff and the other shareholders of the railway company therefore had no interest in them; but whatever may have been the power to borrow these moneys, I take it to be clear that so long as the moneys remained at the bank to the credit of the company, the bankers were debtors to the company for the amount of the moneys, as they could not be drawn out by the members of the provisional committee in their individual

character or otherwise than in their character of trustees. The moneys therefore must, in my opinion, be considered to have been fixed with the character of trust moneys both whilst they remained at the bank and when they were drawn out of it."

In the case of *Salomons* v. *Laing*, 12 Beavan, 349, 377, which was a suit in equity brought by a shareholder in a corporation to enjoin the directors from investing the moneys of the corporation in the stock of another corporation in which the first named corporation had no authority to invest, and to charge the corporation whose shares had been purchased, as a trustee of the money paid to it for its shares, Lord Langdale, Master of the Rolls, said (page 382): "Now, whether it is alleged in words or not, it appears that both the parties to the transaction are guilty of fraud and collusion. They are guilty of fraud against the legislature who gave them their powers for purposes entirely different, and they are guilty of collusion in uniting and combining together for the purpose of completing that fraud. But it is not necessary to declare that they have been guilty of fraud and collusion: it is enough to say that they were parties to the same breach of trust, the one in paying, and the other in receiving these moneys for a known illegal purpose, to which neither of them had any right to apply it; and that this money which is now in the hands of the Portsmouth Company, ought to be restored."

In the case of *Ernest* v. *Croysdill*, 2 De Gex, Fisher & Jones, 175, which was a suit by the official manager of a provisionally registered railway company, which had failed to obtain an act of incorporation, against the official manager of a similarly situated railway company,

to obtain payment of a balance of money loaned by the plaintiff's company to the other, and which had been in turn loaned by the borrowing company to a canal corporation, out of the money received by the borrowing company on an assignment of its judgment obtained on such claim against the canal corporation; Knight Bruce, L. J. said, (pages 192, 193): "The loan was irregular, and a wilful breach of trust on the part of those who personally participated in it; and the money, therefore, remained in equity the property of the plaintiff's company. * * * The plaintiff (is), I think, entitled to follow the 10,000 *l.* which was specifically the money of the company—as part of the 17,000 *l.* of which that company was deprived by a breach of trust —the 10,000 *l.* having also found its way into the funds of the canal company, by another breach of trust."

Turner L. J. said (page 196): "Nor was it disputed, nor can it be denied, that the payment over of these moneys to the London & Birmingham Company was not in any manner justifiable. The one company had no power to make the loan; the other company had no power to accept it. The whole transaction was a breach of trust, and the London & Birmingham Company had, through their directors and their finance committee, notice that it was so."

The following additional authorities in support of this point are cited, viz: *Wiley* v. *Coxe*, 15 How., (U. S.) 420; *Moulton* v. *Robinson*, 7 Foster, (N. H.) 551; *Parker* v. *Garrison*, 61 Ill. Reps., 250; *Story's Eq. Juris.*, Vol. 2, Secs. 964, 1252a; *Pomeroy's Eq. Juris.*, Vol. 1, Sec. 157.

From the foregoing authorities it seems clearly established that jurisdiction in equity, of this cause, is complete and perfect upon each of the five grounds hereinabove stated.

II.

A CORPORATION MAY ALWAYS PLEAD ULTRA VIRES TO A CONTRACT IT HAD NO POWER TO MAKE AND WHICH IS PROHIBITED BY ITS CHARTER.

SUCH A CONTRACT IS ABSOLUTELY VOID. NO AMOUNT OF PERFORMANCE CAN RENDER AN ABSOLUTELY VOID CONTRACT VALID.

THE DOCTRINE OF LACHES,—OR EQUITABLE ESTOPPEL,—APPLIES TO VOIDABLE CONTRACTS. IT HAS NO APPLICATION TO CORPORATION CONTRACTS THAT ARE ABSOLUTELY VOID,—NOT ONLY BECAUSE PROHIBITED BY THE LAW OF THEIR CREATION, BUT ALSO VOID BECAUSE OPPOSED TO PUBLIC POLICY.

NO ACQUIESCENCE OF STOCKHOLDERS CAN RENDER A VOID CONTRACT VALID.

EVERY ACT AND INSTANT OF PERFORMANCE OF SUCH VOID CONTRACTS IS A NEW VIOLATION OF LAW AND DUTY BY THE CORPORATION.

EQUITY WILL NEVER CRYSTALLIZE VIOLATIONS OF LAW AND CHARTER RIGHTS INTO VALID CONTRACTS SIMPLY BECAUSE THE VIOLATIONS HAVE BEEN REPEATED AND LONG CONTINUED.

NO RIGHTS CAN GROW OUT OF PARTIAL PERFORMANCE OF SUCH VOID CONTRACTS.

ACTS DONE BY A CORPORATION, WHICH ARE EXPRESSLY PROHIBITED, OR WHICH ARE OPPOSED TO PUBLIC POLICY, ARE ABSOLUTELY AND IRRETRIEVABLY VOID.

IF THIS LEASE OR CONTRACT IS ULTRA VIRES BECAUSE THE CONTRACTING PARTIES POSSESSED NO POWER TO MAKE SUCH A CONTRACT, THEN IT IS ILLEGAL AND ABSOLUTELY VOID, BECAUSE OPPOSED TO PUBLIC POLICY, AND APPELLANT HAS THE RIGHT, AND IT IS ITS DUTY, TO AFFIRMATIVELY ASK RELIEF BY CANCELLATION AND DELIVERY UP OF THE LEASE.

IT IS RECOGNIZED AND ESTABLISHED LAW THAT ALL POWERS AND RIGHTS NOT EXPRESSLY GRANTED TO CORPORATIONS, ARE AS EXPRESSLY PROHIBITED.

ESPECIALLY IS THIS TRUE OF CORPORATIONS POSSESSING THE EXTRAORDINARY POWER OF EMINENT DOMAIN GIVEN TO RAILROAD CORPORATIONS, FOR WHICH THEY OWE A CONSTANT DUTY TO THE PUBLIC.

IT IS ALSO RECOGNIZED LAW THAT PUBLIC POLICY DEMANDS THAT SUCH CORPORATIONS BE HELD STRICTLY WITHIN THE POWERS GRANTED.

IF THIS WERE NOT THE LAW SUCH CORPORATIONS COULD EXTEND THEIR POWERS INDEFINITELY BY ENTERING INTO ILLEGAL AND ULTRA VIRES CONTRACTS AND PERFORMING SUCH VOID CONTRACTS FOR A FEW YEARS.

SUCH A DOCTRINE WOULD NOT ONLY BE ABSURD, BUT IT WOULD BE FULL OF DANGER.

These propositions are fully sustained and definitely established by both American and English authority.

In *Thomas* v. *Railroad Company*, 101 U. S., 86, this Court, speaking by Mr. Justice Miller, said:

"Not only so, but it is a contract forbidden by public policy and beyond the power of the defendants to make. Having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment. *This duty was independent of the clause in the contract which gave them the right to do it.* Though they delayed its performance for several years, it was nevertheless a rightful act when it was done. Can this performance of a legal duty, a duty both to stockholders of the company and to the public, give to plaintiffs a right of action? Can they found such a right on an agreement, void for want of corporate authority and

forbidden by the policy of the law? To hold that they can, is, in our opinion, to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts."

In a preceding part of this same decision,—page 83,—the following clear and emphatic language is used:

"A contract not within the scope of the powers conferred on the corporation can not be made valid by the assent of every one of the shareholders, nor can it by any partial performance become the foundation of a right of action. * * *

"Where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions, which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burdens which it imposes, is a violation of the contract with the State, *and is void as against public policy.*"

This decision was approved, and the propositions therein announced were reaffirmed and emphasized in *Penn. R. R. Co.* v. *St. L. A. and T. H. R. R. Co.*, 118 U. S., 316, 317. In considering the argument pressed in that case, that long continued performance of the contract had worked an estoppel and prohibited the parties entering into the contract from averring its invalidity, Mr. Justice Miller, in commenting upon the cases cited in support of that proposition, said:

"Undoubtedly there are such decisions of courts of high authority, and there is such a principle, very sound in its application to appropriate cases. But we understand the rule in such cases to stand upon the broad ground that the *contract itself is void*, and that neither what has been done under it, nor the action of the court, can infuse any vitality into it."

In *Board of Comm'rs of Tippecanoe Co.* v. *L. B. & M. R. R. Co.*, 50 Ind., 112, the Supreme Court of Indiana, in holding a lease very similar to the lease here involved *void*, used the following langnage:

"It is also claimed by the appellees, that if the contract was originaliy *ultra vires* the corporation, the parties complaining of it have acquiesced in its terms such a length of time, received benefits under it, and confirmed it by so many acts, that they are now estopped from questioning its validity. A contract *ultra vires* the charter is *void*, and cannot be made valid by any subsequent act of the corporation, because there is no residuary power to confirm it. What they could not make, they cannot confirm. A void act can never become valid, merely because it remains unquestioned."

In *Scoville* v. *Thayer*, 105 U. S., 149, 150, Mr. Justice Woods, quoting with approval the language of Vice-Chanceller James in *Stace and Worth's Case*, Law Reps. 4 Ch. Apps., 682, said:

"We think that he is not estopped to set up the nullity of the unauthorized stock. * * *

"The corporation being absolutely without power to increase its stock above a certain limit, the acquiescence of the shareholder can neither give it validity, nor bind him or the corporation. * * *

"Vice-Chancellor James, in giving the reasons for

his decision said: 'It is, however, contended that notwithstanding the agreement itself was *ultra vires* and void, yet there are personal acts and things personally affecting these two gentlemen which render them still liable as shareholders.' These were the acceptance of shares by Stace and Worth, the fact that their names appeared on the register of shareholders, and that they had sat as directors of the corporation after the attempted amalgamation. But he declared: 'This was a void agreement with a void acting upon it, a void recognition, and a void ratification by the acts which have been mentioned. It comes to an aggregate of nothings, and that aggregate of nothings is all that there is to fix those gentlemen on the list of stockholders.' "

In *New Castle Northern Railway Co.* v. *Simpson*, 21 Fed. Rep., 537, Acheson J., said:

"Where there is fraud against public policy, a court of equity will rescind, notwithstanding the party plaintiff has participated therein, if public policy would be defeated by allowing the instrument to stand. And so long as the contract continues executory, the maxim *in pari delicto* does not apply at all. These principles open the way for equitable intervention here, and nothing appears to induce a denial of the release sought. It is, indeed, inferable from the evidence that all the stockholders of the plaintiff company either expressly assented to the contract of October 5, 1883, or acquiesced for a season therein. But a contract not within the scope of the powers conferred on a corporation, and against public policy, can not be made valid by the assent of every one of the shareholders. Nor is it a sufficient reason for refusing to interfere, that some of

the directors, who were parties to the indefensible scheme for private speculation heretofore referred to, were active in promoting this suit, and in its prosecution. Even for them there is a *locus penitentiae*. They, however, are not the complainants. The suit is by the corporation, which owes a paramount duty to the public. Its former course was inexcusable indeed; but, having retraced its false steps, it is now in the right pathway. Having entered into a contract forbidden by public policy, it was the duty of the company to rescind or abandon it at the earliest moment. This it has done; but to the end that it may the better discharge its obligation to the public, it needs the aid of a court of equity to set aside the improvident and illegal contract with which it is embarrassed."

In *O. & M. R. R. Co.* v. *I. & C. R. R. Co.*, Am. Law Reg., Vol. 5, New Series, p. 739, which involved the validity of a thirty year lease, by an Indiana railroad corporation, of a part of the railroad of an Ohio corporation, Judge Storer said:

"*In such cases there is no estoppel*, for there is no legal competency in the contracting parties; and the affirmance, or disaffirmance, of their acts, by matter *in pais*, or by corporate resolutions, can give no validity to that which never legally existed. If a corporation could be estopped from setting up its want of authority to enter into contracts made by its agents, its power might be indefinitely enlarged, and what it was not permitted to do by its charter would become obligatory by its acquiescence. In other words, the effect of such a rule would be to authorize corporate officers to supply all deficiencies in power already granted, with ability to add new powers as the occasion might require, and thus

save the necessity of asking legislative aid to amend or modify their charter."

In *Miners' Ditch Co.* v. *Zellerbach*, 37 Cal., 543–579, the Court said:

"The term *ultra vires*, whether with strict propriety or not, is used in different senses. An act is said to be *ultra vires* when it is not within the scope of the powers of the corporation to perform it under any circumstances or for any purposes. An act is also sometimes said to be *ultra vires* with reference to the rights of certain parties when the corporation is not authorized to perform it without their consent, or with reference to some specific purpose when it is not authorized to perform it for that purpose, although fully within the scope of the general powers of the corporation, with the consent of the parties interested, or for some other purpose. When an act is *ultra vires* in the *first* sense mentioned, it is generally, if not always, VOID *in toto*, and the corporation may avail itself of the plea; but when it is *ultra vires* in the second sense, the right of the corporation to avail itself of the plea will depend upon the circumstances of the case. When the act in question is one which the corporation is not authorized to perform under any circumstances, the defense is available to the corporation against all persons, because they are bound to know, from the law of its existence, that it has no power to perform the act. * * * * And the test as between strangers having no knowledge of an unlawful purpose and the corporation, is to compare the terms of the contract with the provisions of the law from which the corporation derived its powers; and if the Court can see that the act to be performed is necessarily beyond the powers of the corporation for any

purpose, the contract can not be enforced, otherwise it can."

In *Morawetz on Private Corporations*, Second Ed., Sec. 620, the law is stated as follows:

"So a sale, lease, or mortgage of property acquired by a railroad company by the exercise of the power of eminent domain, being in violation of the rights of the State unless expressly authorized, cannot be made valid by unanimous ratification of the shareholders."

In *Wood's Railway Law*, Vol. 1, Sec. 171, it is said:

"Acts done by it which are expressly prohibited by statute, *or which are opposed to public policy*, are simply *illegal* acts, in respect to which a corporation stands upon precisely the same footing as an individual, and *are absolutely and irretrievably void*."

In the recent case of *Central Transportation Co.* v. *Pullman's Palace Car Co.*, Supreme Court Rep., Vol. 11, No. 19, p. 478,—decided March 2, 1891,—Mr. Justice Gray, after a thorough and exhaustive review of the leading decisions upon the propositions now under discussion, makes the following clear and explicit announcement of the law:

"The clear result of these decisions may be summed up thus: The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: The obligation of every one contracting with a corporation to take notice

of the legal limits of its powers; the interest of the stockholders, not to be subjected to risks which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law. A corporation can not, without the assent of the Legislature, transfer its franchise to another corporation, and abnegate the performance of the duties to the public, imposed upon it by its charter as the consideration for the grant of its franchise. * * *

"The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows: A contract of a corporation which is *ultra vires* in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities, which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by exist-

ing laws, neither the corporation, nor the other party to the contract, can be estopped by assenting to it, or by acting upon it, to show that it was prohibited by those laws. The doctrine of the common law, by which a tenant of real estate is estopped to deny his landlord's title, has never been considered by this court as applicable to leases by railroad corporations of their roads and franchises. It certainly has no bearing upon the question whether this defendant may set up that the lease sued on, which is not of real estate, but of personal property, and which includes, as inseparable from the other property transferred, the inalienable franchise of the plaintiff, is unlawful and void, for want of legal capacity in the plaintiff to make it. A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract."

The English decisions are in exact and full accord with the principles thus announced by this Court.

In *Ashbury Railway Carriage and Iron Co.* v. *Riche*,

L. R. 7 H. L. 653, S. C. 14 Moak's English Reports, 42,—which is the leading English decision on this subject,—the facts were as follows: The Ashbury Company was organized under the Limited Companies Act, one of the objects specified in its memorandum of association being, "to carry on the business of mechanical engineers and general contractors." The directors made a contract to purchase a concession granted by the Belgian Government to build a railway, and formed themselves with Riche, the defendant in error, and the concessionaries, into a company under the laws of Belgium, to work the concession, it being agreed that Riche should do the actual work of construction and that the money should be furnished by the Ashbury Company. The stockholders of the Ashbury Company held meetings regarding the agreement, and took action at them which was claimed to amount to a ratification. Riche sued the company for breach of contract, the funds not being forthcoming.

Lord Cairns, Lord Chancellor, said (p. 672.): "I am clearly of opinion that the contract was entirely, as I have said, beyond the objects in the memorandum of association. If so, my Lords, it is not a question whether the contract ever was ratified or was not ratified. If it was a contract void at the beginning, it was void because the company could not make the contract. If every shareholder of the company had been in the room, and every shareholder of the company had said, 'That is a contract which we desire to make, to which we sanction the placing the seal of the company,' the case would not have stood in any different position from that in which it stands now. The shareholders would thereby, by unanimous consent, have been at-

tempting to do the very thing which, by the act of Parliament, they were prohibited from doing."

Lord Cairns then quotes the words of Mr. Justice Blackburn in this same case in the trial Court, (the Court of Exchequer Chamber) as follows: (p. 673) "I do not entertain any doubt that if, on the true construction of a statute creating a corporation, it appears to be the intention of the Legislature, expressed or implied, that the corporation shall not enter into a particular contract, every court, whether of law or equity, is bound to treat a contract entered into contrary to the enactment as illegal, and therefore wholly void, and to hold that a contract wholly void cannot be ratified," and then proceeds, "My Lords, that sums up and exhausts the whole case."

Lord Chelmsford said (p. 679): "It is exactly in the same condition as if no contract at all had been made, and therefore a ratification of it is not possible."

Lord Hatherley said (p. 683): I am of opinion, like my noble and learned friends who have preceeded me, that no amount of ratification or confirmation by individual shareholders could give validity to the contract in question."

Lord O'Hagan said (p. 692): "Any such ratification, if relied on, being in clear contravention, of the purpose and the letter of the law, should in my opinion be held void and illegal."

The case of *East Anglian Railway Company* v. *The Eastern Counties Railway Company*, 11 C. B., 775, was an action on an agreement made by the defendant railway company, that it would lease for 999 years the road of the plaintiff railway company, when the plain-

tiff's railroad should have been completed and power should have been given by Parliament to the plaintiff company to make a lease of its line, and that the defendant company should be liable for the expenses of the application to Parliament. The suit was brought to recover the expenses of the application to Parliament. The defendant pleaded that the contract was *ultra vires* as to both companies, and that several of the stockholders of the defendant company, (naming them) did not assent to the making of the agreement; and that no act of Parliament had been obtained prior to the bringing of the suit, authorizing such lease. The plaintiff demurred to the plea.

The Court held that the agreement was *ultra vires* as to both companies, and absolutely void; and that the fact that there were dissentient stockholders was immaterial; and consequently held the plea good.

Jervis, C. J., in delivering the opinion of the Court said (pages 811, 813): "Whatever be their object, or the prospect of success, they are still but a corporation for the purpose only of making and maintaining the Eastern Counties Railway; and if they cannot embark in new trades, because they have only a limited authority, for the same reason they can do nothing not authorized by their act, and not within the scope of their authority. * * * If the contract is illegal, as being contrary to the act of Parliament, it is unnecessary to consider the effect of dissentient stockholders; for, if the company is a corporation only for a limited purpose, and a contract like the one under discussion is not within their authority, the assent of all the shareholders to such a contract, though it may make them all personally liable to per-

form such contract, would not bind them in their corporate capacity, or render liable their corporate funds."

In the case of *The Great Northern Railway Company* v. *Eastern Counties Railway Company*, 12 Eng. Law and Eq., 224, upon an application for an injunction to restrain the defendants from interfering, contrary to an agreement between the parties, to obstruct the plaintiffs in their use of a part of defendant's road, which was opposed on the ground that the agreement was *ultra vires*, the Vice Chancellor said: "If, therefore, this cause had rested wholly upon the construction of the agreement between the plaintiffs and the defendants, I should have thought it the duty of the Court to interfere to some extent by injunction; but I think *there lies at the root of this case a question of public policy*, which precludes the interference of the Court."

Winch v. *The Birkenhead, Lancashire and Cheshire Junction Railroad Company*, 13 Eng. Law and Eq., 506, was a suit in equity brought by a shareholder to restrain the corporation from entering into an agreement, which amounted to a lease of the defendant's road to the London and Northwestern Company. The Vice Chancellor, Sir J. Parker, in disposing of the case, used the following language: "It seems to me that it is not a question of simple incapacity on the part of the London and Northwestern Railway Company to undertake the working of this line, but that it is *against the policy* of these acts of Parliament; and I think, therefore, that the agreement for making over this property to them is an agreement *savoring of illegality*, which any shareholder in the Birkenhead Company has a right to come to the Court to restrain."

The opinion of Judge Selden in *Bissell* v. *The Michi-*

gan Southern and Northern Indiana R. R. Cos., 22 N. Y. Reps., 281–304, contains a very clear and full discussion of the proposition that contracts of railroad companies *ultra vires* their charters, are *illegal* and void *because opposed to public policy;* and aptly collates the leading English cases in support of that proposition. But it is wholly unnecessary to further argue or elaborate propositions completely established and set at rest by the decisions of this Court.

In addition to the authorities above quoted and cited, the following decisions, and text-books, support the propositions under discussion:

Parkersburg v. *Brown*, 106 U. S., 501; *Lewis* v. *City of Shreveport*, 108 U. S., 287; *Loan Association* v. *Topeka*, 20 Wall. (U. S.), 667; *P. and R. I. Ry. Co.* v. *Coal Valley Mining Co.*, 68 Ill., 489, 494; *Davis* v. *Old Colony R. R. Co.*, 131 Mass., 258; *Railway Companies* v. *Keokuk Bridge Co.*, 131 U. S., 389; *Hare* v. *Railroad Company*, 2 Johnson & Hemming's Reps., Eng. Ch., 111; *Spring Co.* v. *Knowlton*, 103 U. S., 59, 60; *Morawetz on Private Corp.*, Secs. 422, 619, 620, 656, 657, 691, 692, 705, 706, 1115, 1120; *Wood's Railway Law*, Vol. 1, Secs. 171, 169, 173; *Green's Brice's Ultra Vires*, Part 2, Chap. 1, Sec. 1, pp. 28–34, and notes; *Dodge* v. *Woolsey*, 18 How. (U. S.), 341–343; *The P. and D. Canal Co.* v. *Dandridge*, 8 Gill & John. (Md.), 248, 318; *Hood* v. *N. Y. and N. H. R. R. Co.*, 22 Conn., 502; *The Naugatuck R. R. Co.* v. *The Waterbury Water Company*, 24 Conn., 468; *Bank of Michigan* v. *Niles*, 1 Douglass (Mich.), 401; *Farmers' Loan and Trust Co.* v. *St. J. and D. C. R. R. Co.*, 1 McCrary (U. S. C. C. R.), 248, 249; *A. and P. Tel. Co.* v. *U. P. Ry. Co.*, 1 McCrary (U. S. C. C. R.), 547, 548; *W. U. Tel. Co.* v. *U. P. Ry. Co.*, 1 McCrary (U. S. C. C. R.), 422;

Peterson v. *Mayor, etc.*, *N. Y.*, 17 N. Y., 454; *Kent* v. *Quicksilver Mining Co.*, 78 N. Y., 185.

If authority can establish any proposition it is certainly an established principle of law that any contract made by a railroad corporation, not authorized by its charter, is inoperative and *void*, and is actually *illegal, because opposed to public policy*, and that it is not only the right, but it is the *duty* of the corporation, to take affirmative proceedings to procure the cancellation and surrender of such illegal contract, for the purpose of removing all cloud from the title of the company to its property and franchises, and put it in condition to perform the obligations due to the public in consideration of the franchises under which it exists as a corporation.

III.

THE AMENDED BILL SHOWS EQUITY ON ITS FACE. UNLESS BOTH APPELLANT AND APPELLEE POSSESSED CORPORATE POWER, —EITHER BY THEIR SPECIAL CHARTERS, OR BY THE STATUTES OF THE STATES FROM WHICH THEY, RESPECTIVELY, DERIVED CORPORATE EXISTENCE,—TO EXECUTE THIS PRETENDED LEASE, IT IS ULTRA VIRES, VOID, AND ILLEGAL BECAUSE OPPOSED TO PUBLIC POLICY.

IF THE LEASE IS ULTRA VIRES, VOID, AND ILLEGAL BECAUSE OPPOSED TO PUBLIC POLICY, IT IS THE RIGHT, AND THE DUTY, OF APPELLANT TO REPUDIATE IT, AND TO ASK THE AFFIRMATIVE RELIEF OF A COURT OF EQUITY TO COMPEL IT TO BE CANCELLED AND DELIVERED UP, TO THE END THAT APPELLANT MAY RESUME THE POSSESSION AND USE OF ITS RAILROAD, EQUIPMENT AND CORPORATE FRANCHISES, FREED FROM THE CLOUD CAST UPON ITS TITLE BY THIS VOID AND ILLEGAL LEASE.

TO RENDER THIS PRETENDED LEASE VALID, BOTH PARTIES MUST HAVE POSSESSED FULL POWER TO MAKE IT, AND IT MUST

HAVE BEEN MADE IN THE MANNER AND PURSUANT TO THE REQUIREMENTS OF LAW AUTHORIZING THE MAKING OF SUCH A LEASE.

NEITHER OF THESE CORPORATIONS POSSESSED POWER TO ENTER INTO THIS PRETENDED LEASE.

1. It is settled beyond controversy, that the Terre Haute and Indianapolis Railroad Company, appellee herein, possessed no power under its special charter, or under the General Statutes of Indiana, to execute this pretended lease as *lessee* therein, or to *accept* the possession and control of appellant's railroad, equipment and franchises under said pretended lease.

This Court has so held in a case involving the validity of a contract identical in character, purpose and effect with the contract here involved.

In other words, this Court, on a full and careful examination of all the statutes of Indiana bearing on the subject, has definitely held that it is the *public policy* of the State of Indiana to *prohibit* its railroad corporations from becoming *lessees* of railroads and corporate franchises of foreign corporations.

In *Penn. R. R. Co.* v. *St. L. A., and T. H. R. R. Co.*, 118 U. S., 290, it is clearly and distinctly decided that the statutes of Indiana give no power whatever to an Indiana railroad corporation to accept a lease of a railroad in another State. In that case Mr. Justice Miller —pages 310, 314,—said: "But if the other party to the contract, the Indianapolis and St. Louis Company, had no such authority, the contract of lease is void as to it. * * * The validity of the contract depends on its power as an Indiana corporation to make it at the time it was made. It had none then, and no act of the Indiana Legislature has ratified it since."

On petition for rehearing, after all the statutes of the State of Indiana bearing upon that question had been pressed upon the attention of the Court, in delivering the opinion overruling the petition for rehearing, the Court say, 118 U. S., 630, on p. 633:

"We have very carefully examined this petition, and while, on one of the main points in the case, namely, the statutory authority of the Indianapolis and St. Louis Railroad Company, under the laws of Indiana, to make the lease which was the foundation of the suit, there are some other statutes and some other decisions of the State and the State Court cited, we do not think they invalidate the ground on which the decision of this Court at the last term rested. * * * There is, in our opinion, no authority found in them for the lease by the defendant company of the entire road, property, franchise, powers, and control of the plaintiff's road for ninety-nine years."

2. In another connection I think I shall be able to show that the *public policy* of Illinois does not differ from that of Indiana on this point. But even if the public policy, and the laws of Illinois, did permit the St. Louis, Vandalia and Terre Haute Railroad Company, appellant herein, to enter into such a contract of lease, under certain circumstances and upon the performance of certain conditions precedent, it is very evident that the requirements of the law were not complied with in the execution of this pretended lease.

The act of the Illinois Legislature of February 16, 1865, *supra* p. 7, provided that it should not be *lawful* for any railroad company of Illinois to consolidate with any railroad out of the State of Illinois, "or to lease their road to any railroad company out of the State of Illinois *without having first obtained the written*

consent of all of the stockholders of said roads residing in the State of Illinois; and any contract for such consolidation or lease which may be made *without having first obtained said written consent* signed by the resident stockholders in Illinois, shall be *null and void*."

It is very certain that this statute required, *as a condition precedent* to the making of any lease, the procurement of the written assent of all the stockholders resident in Illinois. This requirement being a condition precedent, the power to make such a contract did not exist in the appellant corporation, and could not exist in it *until the condition precedent had been first fully performed*. No such performance or attempted performance took place. Therefore appellant never possessed the corporate power to make any such lease or contract. The law constituted an absolute *prohibition* against the making of any such lease, without first procuring such written assent. It further, in express terms, provides that any lease or contract made in violation of the condition precedent set forth in that law, *shall be absolutely null and void*. There can be no doubt that the Legislature possessed the right to so limit the corporate powers of appellant corporation.

A statute of Nebraska authorized any railroad to lease, sell, etc., its railroad upon such terms as might be agreed upon, "provided, however, that no sale or purchase shall be made of a railroad situated within this State, by a company without this State, or consolidations effected as provided in this act, until the terms of such sale or consolidation shall have been approved by a majority of the stockholders in interest." A claim was made for certain balances due under a

lease executed by one railroad company to another. It did not appear that the lease in question had been approved by the stockholders. The Court held that the contract was unauthorized and invalid. *Farmers' Loan and Trust Co.* v. *St. J. & D. C. R. R. Co.*, 1 McCrary (U. S. C. C. R.), 248, 249.

An act of Parlaiment empowered one railroad company to grant, and another company to accept, a lease of a railway, provided that the power to lease should not arise until the Board of Trade had certified that it had been proven to their satisfaction that half the capital of the leasing company had been raised and applied for the purposes of their acts. The Court held "that no lease, or binding agreement, for a lease, could be made before the certificate had been obtained." *Kent Coast Ry. Co.* v. *London, etc., Ry. Co.*, Law Reps., 3 Ch. App., 656, 664, 667.

3. There is what is well termed a *general public policy* which *prohibits* corporations, that have received public grants of valuable franchises intended to be exercised for the *public good*, to disable themselves, *by any contract*, from the due performance of the duties to the public enjoined upon them in consideration of the franchises granted. The prohibition of this general public policy can only be overcome by clear and explicit grants of power found either in the charters of the corporations or in the general statutes of the governments from which they derive corporate existence.

This proposition is sustained by abundant and unquestioned authority.

In *Penn. R. R. Co.* v. *St. L. A. & T. H. R. R. Co.*, 118 U. S., 309, this Court laid down the following rule:

"We think it may be stated, as the just result of these cases and on sound principle, that unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot, *by lease or any other contract*, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers, nor can any other railroad company without similar authority make a contract to receive and operate such road, franchises and property of the first corporation, and that such a contract is not among the ordinary powers of a railroad company, and is not to be presumed from the usual grant of powers in a railroad charter."

In *Thomas* v. *Railroad Co.*, 101 U. S., 82, 83, this Court, by Mr. Justice Miller, said:

"We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others. * * * Where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, *any contract* which disables the corporation from performing those functions, which undertakes, without the consent of the State, to transfer to others the rights and powers conferred by the charter, and to relieve the

grantees of the burden which it imposes, *is a violation of the contract with the State, and is void as against public policy.*"

In *Oregon Railway and Navigation Co.* v. *Oregonian Railway Co.*, 130 U. S., 20, 21, 36, the following language is used by Mr. Justice Miller in announcing the decision of this Court:

"It may be considered as the established doctrine of this court in regard to the powers of corporations, that they are such and such only as are conferred upon them by the acts of the legislatures of the several States under which they are organized. A corporation in this country, whatever it may have been in England at a time when the crown exercised the right of creating such bodies, can only have an existence under the express law of the State or sovereignty by which it is created. * * *

"Outside of the powers conferred and the privileges granted to those organizations by the statutes under which they exist, they are in all the States of the Union, which like Oregon have the common law as the foundation of their jurisprudence, governed by that common law; and it is the established doctrine of this court, and, with some exceptions, of the States in which that common law prevails, as well as of Great Britain, from which it is derived, that such a corporation can exercise no power or authority which is not granted to it by the charter under which it exists, or by some other act of the legislature which granted that charter. * * *

"Even if a domestic railroad corporation established under the general laws of Oregon could be construed as entitled to assume by its articles the power of taking leases of other railroads as incident to and in

connection with operating its own road, it would by no means follow that such a corporation could assume the power of leasing its whole railroad for a term of years to another corporation, and thereby substantially abandon and transfer its whole corporate rights and franchises.

"The Oregonian Company is a foreign corporation and the general laws of Oregon do not give a foreign corporation the right to lease a railroad within the state."

In *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 11 Supreme Court Rep., 484, 485, Mr. Justice Gray, in holding a lease for ninety-nine years, executed by the Transportation Co. to the Car Co., *void*, used the following language:

"The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: The obligation of every one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders, not to be subjected to risk which they have never undertaken; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law. A corporation cannot, without the assent of the legislature, transfer its franchise to another corporation, and abnegate the performance of the duties to the public, imposed upon it by its charter as the consideration of the grant of its franchise. * * *

"The plaintiff was not a strictly private, but a *quasi* public corporation; and it must be so treated as regards the validity of any attempt on its part to absolve itself from the performance of those duties to the public, the performance of which by the corporation itself was the remuneration that it was required by law to make to the public in return for the grant of its franchise."

In the *York and Md. Line Ry. Co.* v. *Winans*, 17 How., (U. S.) 39, this Court said: "This conclusion implies that the duties imposed upon the plaintiff by the charter are fulfilled by the construction of the road, and that by alienating its right to use, and its powers of control and supervision, it may avoid further responsibility. But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation to enable it to provide the facilities to communication and intercourse, required for the public convenience. Corporate management and control over these were prescribed, and corporate responsibility for their insufficiency provided as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations, without the consent of the Legislature."

Chancellor Zabriskie, in *Black* v. *Del. & Rar. Canal Co.*, 22 N. J. Eq., 130, said: "It may be considered as settled that a corporation cannot lease or alien any franchise, or any property necessary to perform its obligations and duties to the State, without legislative authority."

In *Beaman* v. *Rufford*, 1 Simons Ch. Reps., N. S.,

550, a railway company constituted under an act of Parliament, agreed with two other railroad companies that its entire railroad and property, without incumbrance, when accepted, should be worked by those two companies; that those companies should have perfect control and exercise of the rights of the first mentioned company for twenty-one years. The Court held that the agreement was illegal as being in violation of the act under which the first mentioned company was constituted. Lord Cranworth, Vice-Chancellor, said:

"In my opinion this is neither more nor less than a contract on the part of the O. W. & W. Co. that when their line is completed they will hand it over to be worked by the L. & N. W. Co. and the M. Co., which is delegating the functions which the legislature has given to them, to other parties, which they have no possible right to do."

In *Kent* v. *Quicksilver Mining Co.*, 78 N. Y., 185, Judge Folger said: "When the public is concerned to restrain a corporation within the limit of the power given to it by its charter, an assent by the stockholders to the use of unauthorized power by the corporate body will be of no avail."

The following authorities are to the same effect, and fully support the propositions advanced:

Pearce v. *M. & I. R. R. Co.*, 21 How. (U. S.), 441; *Davis* v. *Old Colony R. R. Co.*, 131 Mass., 258; *Troy & Boston R. R. Co.* v. *Boston, Hoosac Tunnel & Western Ry. Co.*, 86 N. Y., 107; *Abbott* v. *Johnstown, etc., Horse R. R. Co.*, 80 N. Y., 27; *Pittsburgh & Connellsville R. R. Co.* v. *Bedford & Bridgeport R. R. Co.*, 81 Pa. State, 104; *Rock River Bank* v. *Sherwood*, 10 Wis., 180; *Miners*

Ditch Co. v. *Zellerbach*, 37 Cal., 543, 579; *Hood* v. *N. Y. & N. H. R. R. Co.*, 22 Conn., 502; *O. & M. Railroad Co.* v. *I. & C. Railroad Co.*, 5 Am. Law Reg. N. S., 733; *Ashbury Ry. Carriage & Iron Co.* v. *Riche*, L. R. 7 H. L., 653; *East Anglian Rys. Co.* v. *Eastern Co's. Ry. Co.*, 11 C. B., 775; *McGregor* v. *Dover & Deal R. R. Co.*, 18 Q. B., 618; *Eastern Co's. Ry. Co.* v. *Hawkes*, 5 H. L. Cases, 331, 371–381; *Winch* v. *The Birkenhead, Lancashire and Cheshire Junction R. R. Co.*, 13 Eng. Law and Eq., 506; S. C. Law Reps. 3 Ch. App., 656; *Morawetz on Private Corporations*, Secs. 619, 620, 656, 657, 691, 692, 705, 706, 1120.

In view of these authorities it seems clear, to the point of absolute demonstration, that neither the appellant nor the appellee possessed any corporate power to execute the alleged lease or contract in controversy. If the law of Illinois was binding upon the Illinois corporation it certainly did not possess power to make this lease when it was made, and, as it was made. If the decision of this Court in *Penn. R. R. Co.* v. *St. L. A. & T. H. R. R. Co.*, *supra*, correctly states the law,—and it has been repeatedly affirmed,—it is equally certain that the appellee, the Terre Haute and Indianapolis Railroad Company, did not possess power under its charter and the laws of Indiana, to *accept* this alleged lease. It is therefore clear that the lease, having been executed without corporate power, and in direct violation of law, is absolutely void and illegal and opposed to public policy.

IV.

Is the contract involved in this suit a lease? What is the public policy of Illinois regarding domestic and foreign railroad corporations?

These two questions were much discussed at the

hearing in the Circuit Court, and, inasmuch as they may have some bearing upon the question as to whether appellant's amended bill shows equity on its face, it may be proper to discuss them here.

The eminent counsel for appellee disagreed among themselves, somewhat, as to the character and effect of the contract here involved.

By one it was earnestly contended that it is a contract of far *less* dignity than a *lease*,—that it falls under the *proviso* in the Illinois act of 1865—*supra* p. 7—and that therefore it was unnecessary to get the written consent of the resident stockholders prior to its execution, in order to give it validity; while by another it was as earnestly claimed that it is far *more* than a lease,—nothing less than a *purchase* by the *T. H. & I. R. R. Co.* of the entire road, property and franchises of the *St. L., V. & T. H. R. R. Co.*, and that by it the *T. H. & I. R. R. Co. extended its railroad* from the the west boundary line of Indiana across the State of Illinois to East St. Louis, under license given by the Illinois act of 1855, and the special act of February 8, 1867,—Record p. 55—ameding the charter of the *St. L., V. & T. H. R. R. Co.*

It is certain that both of these positions cannot be correct. They are antagonistic and contradictory.

The reasons given in support of the contention that it is *less* than a *lease* were:

First. Because it contains no words of demise for a fixed period.

Second. Because no fixed rent is reserved.

Third. Because the appellant does not contract to warrant and defend the possession of the appellee for any fixed period.

An examination of the contract will make it clear that neither of these reasons is founded upon fact.

1. A definite term is fixed,—*999 years.*

2. Full possession of the tangible property of the appellant is given to the appellee for the term fixed.

The proof of the two above points is found in the following words of the lease:

> "IT IS THEREFORE AGREED, FIRST, That upon completion of the road between East St. Louis and the State line of Indiana, the Terre Haute and Indianapolis Railroad Company shall take charge of and operate the same with its equipment, for a period of nine hundred and ninety-nine (999) years." *Supra*, p. 4.

3. The corporate franchises of the appellant are surrendered to, and put into possession of the appellee for the term fixed. The proof of this is in the following words, taken from the lease:

> "IT IS FURTHER AGREED, That the Terre Haute and Indianapolis Railroad Company, AS LESSEE, shall enjoy all the rights, powers and privileges of the St. Louis, Vandalia and Terre Haute Railroad Company, so far as the same may be needful to maintain and operate said railroad, also to impose and collect tolls and rates for transportation, and to do all other acts and things as fully and effectually as the said St. Louis, Vandalia and Terre Haute Railroad Company could do if operating said line." *Supra,* p. 5.

4. A *minimum* rent is reserved, which is to be paid by the appellee whether thirty per cent. of the gross earnings does or does not amount to enough to

pay it. The following words from the lease prove this point:

> "If the thirty-five (35) per cent. (under the amendment this should read thirty per cent. instead of thirty-five per cent.) should, from any cause, not be sufficient in amount to protect the interest on mortgage bonds and sinking funds therefor, as they mature from time to time, together with the payment of taxes and proper cost of maintaining organization, so that the rights of stockholders may be preserved, then, and in that event THE LESSEE shall advance for the company whatever amount may be needed, to be accounted for under the yearly averages of this LEASE during the contract." *Supra*, p. 4.

It is clear from this provision of the contract that the appellee is bound to pay for the use of the property and franchises of the appellant a sum of money sufficient to pay the interest on mortgage bonds, provide the sinking funds required by the first mortgage, pay all taxes, and pay proper costs of maintaining the organization of the appellant. These payments are to be made whether the share of the gross earnings set apart to appellant is sufficient to pay them or not. The Supreme Court of Illinois in the case of *Archer* v. *Terre Haute and Indianapolis R. R. Co.*, 102 Ills., 493, decided that this money so to be paid and provided by appellee is *not* a *loan* to the appellant. It cannot, therefore, be successfully denied that this provision of the contract does provide for a minimum rent that is to be paid by appellee in any event.

The *maximum* rent is also fixed by this contract. It is to be, by the terms of the contract, and the amend-

ment thereto, thirty per cent. of the gross earnings, *plus* whatever remains of seventy per cent. of the gross earnings, after paying all operating and maintenance expenses. This point is proved by the following amendment to the contract, viz :

> "RESOLVED, That the President be and he is hereby authorized to change the terms of said LEASE, so that when the said sixty-five (65) per cent. occurs therein it shall read seventy (70) per cent., and that the said Terre Haute and Indianapolis Railroad Company shall be allowed seventy (70) per cent. of the gross receipts from all traffic moved over the line of said road, or business done thereon, in the same manner as if it were so provided in the said original LEASE; but if the working and maintenance expenses of said road shall be less than seventy (70) per cent. of the gross receipts aforesaid, then all such excess shall be paid over to the St. Louis, Vandalia and Terre Haute Railroad Company." *Supra*, p. 6.

It therefore appears that both a minimum and maximum rent is clearly reserved by this contract.

5. The parties intended it to be a lease, and called it a lease. In proof of this we have only to look at the instrument.

> "AND WHEREAS, * * * the said Terre Haute and Indianapolis Railroad Company, having proposed to LEASE and operate the said St. Louis, Vandalia and Terre Haute Railroad for a period of nine hundred and ninety-nine (999) years, * * * and in that event the LESSEE shall advance for the company whatever amounts may be needed, to be accounted for un-

der the yearly averages of THIS LEASE during the the contract, * * * The Terre Haute and and Indianapolis Railroad Company, AS LESSEE, shall enjoy all the rights, powers and privileges of the St. Louis, Vandalia and Terre Haute Railroad Company." *Supra*, pp. 4, 5.

Again, "WHEREAS, At the time of the execution of the LEASE of the St. Louis, Vandalia and Terre Haute Railroad Company * * * it was agreed, etc., * * * as it now stands in said LEASE; therefore,

"RESOLVED, That the President be, and he is, hereby authorized to change the terms of said LEASE." *Supra*, p. 6.

It therefore seems clear, from the words of the instrument itself, that neither of the objections urged against it is tenable.

That this instrument is a lease is well settled by authority. In *Thomas* v. *Railroad Co.*, 101 U. S., 78, 79, this Court, speaking by Mr. Justice Miller, said:

"It is denied by the plaintiffs that the contract can be fairly called a lease.

"But we know of no element of a lease which is wanting in this instrument. 'A lease for years is a contract between lessor and lessee for possession of lands, etc., on the one side, and a recompense by rent, or other consideration, on the other.' 4 Bac. Abr., 632.

"'Anything corporeal or incorporeal lying in livery or in grant may be the subject-matter of a lease, and, therefore, not only lands and houses, but commons, ways, fisheries, franchises, estovers, annuities, rent-charges, and all other incorporeal hereditaments are included in

the common-law rule.' *Bouv. L. D.*, '*Lease*;' *1 Wash. Real Prop.*, 310.

"The railroad, and all its appurtenances and franchises, including the right to do the business of a railroad and collect the proper tolls, are for a period of twenty years leased by the company to the plaintiffs, from whom in return it receives as rent one-half of all the gross earnings of the road. * * *

"The provision for the complete possession, control, and use of the property of the company and its franchises by the lessees is perfect. Nothing is left in the lessor but the right to receive rent. No power of control in the management of the road and in the exercise of the franchises of the company is reserved."

This instrument this Court declared to be a *lease*.

That no specific words of demise are necessary, is proved by the following authority:

"The words 'demise,' 'grant,' and 'to farm let,' are technical words well understood, and are the most proper that can be used in making a lease; but whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it, for such a determinate time, whether they run in the form of a license, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose." *Bouv. L. D., title, "Lease."*

That the especial reservation of rent is not essential to the validity of a lease, is shown to be the law by the following authority:

"It is customary to provide in the lease, by stipulation, that the lessee shall pay to the lessor money, or

other consideration, in the way of rent or return, for the use of the premises. But the reservation of rent is not essential to the validity of a tenancy for years by lease." *Wash. on Real Prop.*, Vol. 1, *292.

In *O. & M. Railroad Co.* v. *I. & C. Railroad Co.*, 5 Am. Law Reg., N. S., 737, 738, Judge Storer, in speaking of the contract and its effect, said:

"It is to secure to the defendants the use of the plaintiffs' roadway for thirty years, on certain conditions, which are the equivalent for what otherwise would be denominated an annual rental.

"First.—The defendants are permitted to lay down, at their own expense, upon the plaintiffs' structure, an additional rail, to remain there subject to all appropriate repairs by the defendants, to be used by them for the entire term.

"Second.—The cars of the defendants are to be run over the road, and it is admitted have been drawn by the defendant's locomotives, under charge of their conductors, and with certain deductions, at their expense, the right to do so being co-extensive with the term already stated. * * *

"We are satisfied, therefore, from a careful examination of the contract between these parties, that it was an agreement for a *lease* to continue for thirty years; that the privilege granted was, in law, an easement for the whole period, and not a mere license to enter upon and use the plaintiffs' road, determinable at their option."

The heads of a proposed agreement were arranged between the directors of two railway companies by which one company was to allow the other company for ninety-nine years to work the lines and use the pro-

perty and plant of the granting company, except certain specific lands and buildings, upon certain terms of allowance, for working expenses and charges, and the maintenance of works and ways. The Court held, "that such an agreement is not distinguished on principle from a lease, to grant which is clearly not within the statutory powers of the granting company." *Winch* v. *The Birkenhead L. & C. J. Ry. Co.*, 13 Eng. Law & Eq., 506; S. C. Law Reps., 3 Ch. App., 656.

An agreement by one railroad company to give to another the power to run over its road for a time, dependant upon certain conditions, although it was declared it should not operate as a lease, or an agreement for a lease, was held "in substance to be either the one or the other." *Great Northern Railway Company* v. *Eastern Counties Railway*, 9 Hare, 308, 312.

From these authorities it seems too clear for discussion that this instrument is in effect a lease, but it makes but very little difference whether it is or not. *The main point to consider is, what does this instrument do?* If it in effect stripped the *St. L. V. & T. H. R. R. Co.* of the possession and control of its railroad and franchises for *999 years* and deprived it during that period of all power to perform its duties to the public enjoined by its charter franchises, it matters not whether it be called a lease or contract of any other kind, it falls within the prohibition of the law, *and is illegal and void as opposed to public policy.* This point is well stated by Mr. Justice Miller in *Thomas* v. *Railroad Co.*, *supra*, in the following words:

"But while we are satisfied that the contract is both technically and in its essential character a lease, we do not see that the decision of that point either way

affects the question on which we are to pass. That question is, whether the railroad company exceeded its powers in making the contract, by whatever name it may be called, so that it is void."

It was contended by counsel for appellee that appellant cannot come into a court of equity and ask *affirmative relief* in its own behalf, to rid itself of this contract by cancellation and delivery up. The argument was that even although the contract is *ultra vires*, and although its invalidity might be interposed by appellant as a *defence*, still, on account of laches and acquiescence appellant is estopped from coming into Court, and on its own motion asking *affirmative relief* in respect to the the void contract.

In other words, it was contended that although appellant might well use the invalidity of the contract as a weapon of *defence*, it cannot use it as a weapon of *attack*.

If this is the law, the leading text books and decisions are strangely out of joint.

"But in cases where the agreements or other transactions are repudiated on account of their being against public policy, the circumstance, that the relief is asked by a party who is *particeps criminis*, is not in equity material. *The reason is, that the public interest requires that relief should be given;* and it is given to the public through the party." *1 Story's Eq., Juris.*, Sec. 298.

"Even where the contracting parties are *in pari delicto* the courts may interfere from motives of public policy. Whenever *public policy* is considered as advanced by allowing *either party to sue for relief against the transaction*, then relief is given to him."

"A court of equity may, in furtherance of justice

and of a sound *public policy*, aid the one who is comparatively the more innocent, and may grant him *full affirmative relief*, by cancelling an executory contract." 2 *Pomeroy's Eq. Juris.* Secs. 941, 942.

In *Thomas* v. *Railroad Co., supra*, Mr Justice Miller said:

"Not only so, but it is a contract forbidden by public policy and beyond the power of the defendants to make. Having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment. *This duty was independent of the clause in the contract which gave them the right to do it.* Though they delayed its performance for several years, it was nevertheless a rightful act when it was done."

In *Spring Co.* v. *Knowlton*, 103 U. S., 60, Mr. Justice Woods said:

"When the illegality consists in the contract itself, and that contract is not executed, in such case there is a *locus penitentiae;* the *delictum* is incomplete; *the contract may be rescinded by either party.*"

In *New Castle Northern Ry. Co.* v. *Simpson, supra*, Judge Acheson said:

"There can be no doubt that a court of equity may entertain a bill to avoid a contract of a corporation which it had no power to make."

The decisions in the following cases are to the same effect, viz:

Trustees of the Auburn Academy v. *Strong*, Hopkins Ch. (N. Y.), 317; *Morris* v. *McCulloch*, 1 Amb. Ch. Reps., 432; *Smith* v. *Bruning*, 2 Vernon, 392; *Drury* v. *Hooke*, 1 Vernon, 411; *Debenham* v. *Ox*, 1 Vesey, Sr., 276; *Lord St. John* v. *Lady St. John*, 11 Vesey, 535. In each of these cases it was held that a party to an illegal and

void contract has a right to come into a court of equity and ask *affirmative relief* by way of delivery up and cancellation.

It was contended in oral argument by the eminent counsel representing appellee, that the public policy of Illinois *only* is involved in this cause, that since the suit is in the Federal Court for the Southern District of Illinois, the Court can *only* consider the public policy of the State of Illinois touching the validity of the contract, no matter what may be the public policy of the State creating the corporation which is the other party to the contract. This theory is based upon the ground that the contract is to be performed in Illinois, and, therefore, if it is not opposed to the public policy of Illinois, no possible objection can be urged against it on the ground that it is opposed to public policy, no matter how objectionable it may be to the public policy of the State creating the other party to the contract.

It is respectfully submitted that this is not the law. The appellant is an Illinois corporation, existing under Illinois law. The appellee is an Indiana corporation, existing under Indiana law. Each corporation is controlled by its charter and the laws of the State creating it, and is amenable to the public policy of that State. Hence, in considering this contract entered into by these two corporations, the laws and public policy of *both* States creating them must be considered. The validity of the contract depends upon the lawful authority of *both* contracting parties to enter into such a contract. Both parties must be lawfully authorized to contract before a valid contract can be made between them. The laws and public policy of Indiana are just

as much involved here as the laws and public policy of Illinois. This point is clearly settled by the decision of this Court in *Penn. R. R. Co., et al.* v. *St. L., A. & T. H. R. R. Co.*, 118 U. S., 309, 310, 314.

After holding most clearly that the *St. L., A. & T. H. R. R. Co.* "was exclusively an Illinois corporation," and that the *I. & St. L. R. R. Co.* was exclusively an Indiana corporation, the Court said: "We must, therefore, proceed to inquire if any such powers have been given to the railroad companies engaged in this transaction." Then, after holding that the *St. L., A. & T. H. R. R. Co.* had full power to make the contract in controversoy, we find these significant words: "But if the other party to the contract, the Indianapolis and St. Louis Company, had no such authority, the contract of lease is void as to it." Then, after fully discussing the Indiana statutes, we find these words: "The validity of the contract depends on its power as an Indiana corporation to make it at the time it was made. It had none then, and no act of the Indiana Legislature has ratified it since. * * * We have been thus careful in our examination into the power of the lessor and lessee companies in the contract of lease, because if the lease itself is void the contract of the other companies must be equally so."

In the case of *Archer* v. *T. H. & I. R. R. Co.*, 102 Ills., 493, much relied upon by counsel for appellee, the Supreme Court of Illinois, on page 503, clearly show that they regarded the laws and *public policy of both States* as being involved in the determination of the validity of the contract, and based the entire decision, as rendered, upon the assumption that the contract was fully authorized by the laws of *both* Indiana and Illinois. The Court said:

"*Both companies signing the agreement had full authority from the States creating such corporations to make such agreement*, and placing that construction upon it, the contract is valid; *otherwise it would be void, because ultra vires.*"

Besides, and in addition to, the public policy of the two States creating the corporations entering into this contract in controversy, there is a *general public policy* involved. This general public policy is not limited by State boundaries, but is co-extensive with our Federal Government. This general public policy is that railroad and other like corporations must be strictly restrained and held within the limit of powers granted to them; and that they have no power by any form of contract to strip themselves of their property and franchise rights, thus disabling them from performing their duties to the public, enjoined upon them in consideration of the franchises granted.

This general public policy has already been discussed and many authorities quoted and cited in support of the proposition above stated, *supra*, pp. 55 to 61.

The dangers arising from failure to enforce this general public policy are well described by Judge Selden in *Bissell* v. *The Michigan Southern and Northern Indiana R. R. Co.*, 22 N. Y., 287, 288, as follows:

"The importance of limiting corporate bodies to the exercise of those powers, and the enjoyment of those privileges and franchises, which have been specifically conferred upon them, must, I think, be obvious. They are rapidly multiplying. Their privileges give them decided advantages over mere private unincorporated partnerships. They have large capitals and numerous agents, and are capable of entering into combinations

with each other. They are not only formidable to individuals, but might even, under some circumstances, become formidable to the State."

What is the public policy of Illinois as shown by its legislation?

. On February 28, 1854, the Illinois Legislature enacted a law by which railroad companies of Illinois were "authorized and empowered to consolidate their property and stock with each other, and to consolidate with companies *out of this State*, whenever their lines connect with the lines of such companies *out of this State*." This law has been repealed. On February 12, 1855, the Illinois Legislature passed a law entitled "An act to enable railroad companies to enter into *operative contracts*, and to borrow money." This is the law quoted by Mr. Justice Miller in *Penn. R. R. Co., et al.* v. *St. L. A. & T. H. R. R. Co., supra*, and chiefly relied on by counsel for defendant in this cause.

It provides that railroad corporations of Illinois "shall have power to make such contracts and arrangements with each other, and with railroad corporations of other States, for leasing or running their roads, or any part thereof, and also to contract for and hold in fee simple, or otherwise, lands or buildings in this or other States for depot purposes; and also to purchase and hold such personal property as shall be necessary and convenient for carrying into effect the object of this act."

In *Penn. R. R. Co., et al.* v. *St. L., A. & T. H. R. R. Co., supra*, Mr. Justice Miller, after quoting the first section of this act, said:

"Though it might be said that this act only authorizes Illinois railroad companies to become leesses, we

think it must be conceeded that this enactment authorized the St. Louis, Alton & Terre Haute Railroad Company, which we have already said was exclusively an Illinois corporation, to enter into the lease or operating contract found in the record."

We do not think this statement would have been made if the statutes of Illinois had been fully cited and considered.

In that case the authority of the *St. L., A. & T. H. R. R. Co.* to enter into the operating contract was conceded by everybody. No counsel in the cause ever questioned that authority. It was impossible to question it, from the fact that on March 11, 1869, the Legislature of Illinois, by a special act, fully ratified, confirmed and legalized the contract between the *St. L., A. & T. H. R. R. Co.* and the *I. & St. L. R. R. Co., and adopted the I. & St. L. R. R. Co. as a corporation of Illinois.* 3 Private Laws Ill., p. 316. With this special act in view, no one of the counsel opposed to the *St. L., A. & T. H. R. R. Co.* in that litigation ever dreamed of questioning the validity of the operating contract as to that corporation. That question was not raised by any pleading in the case, nor was it presented or argued by any counsel in the cause, either orally or by brief.

The very fact that the Illinois Legislature passed this special act of March 11, 1869, ratifying and legalizing the lease of the *St. L., A. & T. H. R. R. Co.* is quite significant, and throws much light upon the construction then given to the act of February 12, 1855, by the Legislature, as well as by the lawyers of Illinois.

If the act of 1855 gave Illinois corporations the right, as lessors, to lease out their roads to railroad corporations of other States, why was it necessary to pass

the special act of 1869? *If that was the public policy of Illinois, why was it deemed necessary by the Legislature, by a special private law, to make the I. & St. L., R. R. Co., as lessor, a corporation of Illinois?* There is but one answer to these questions. It is this: Both the Legislature and the lawyers of Illinois believed and understood that the law of 1855 did NOT give Illinois corporations the right, as lessors, to lease their roads to railroad corporations of other States, but it allowed them to become lessees of railroads belonging to railroad corporations of other States. So understanding the law and public policy of Illinois, the Legislature deemed it necessary to pass this special act of 1869 in order to give validity to the contract already made by the *St. L., & A. T. H. R. R. Co.*, and, in order that this exceptional case might not infringe the general public policy of the State, the Legislature, in the same special act, created the lessee company, the *I. & St. L. R. R. Co.*, a corporation of the State of Illinois.

In *Railroad Co.* v. *Vance*, 96 U. S. 453, which case involved a consideration of this special act of March 11, 1869, Mr. Justice Harlan said:

"Some doubt having been expressed as to the validity of the lease under the laws of Illinois, an act of the General Assembly of that State, approved March 11, 1869, directs that the lease 'be and stand confirmed according to the terms thereof.'"

Another significant fact bearing upon the proper construction of the act of 1855 is this: When that law was passed the third section of it provided as follows:

"Sec. 3. Every railroad incorporated or organized, or which may hereafter be incorporated or organized under the laws of this State, shall have power to borrow

such sums of money from time to time as may, in the opinion of the directors, or a majority of them, be necessary for constructing, building or operating their railroad, *or for aiding in the construction or operating any connecting railroad, whether within or without this State.*"

This third section of the act of 1855 has been repealed, showing that it is the policy of Illinois to prohibit its railroad corporations from putting their funds at risk for any other purpose than the construction and operation of the roads named and described in their charters.

On February 16, 1865, the Legislature of Illinois passed an act declaring it *unlawful* for any railroad company of Illinois to consolidate with, or lease its road to, any railroad company out of the State of Illinois, without first having obtained the written consent of all the stockholders residing in the State of Illinois, and declaring that any contract for such consolidation or lease made, without having first obtained said written consent, signed by the resident stockholders in Illinois, should be null and void. *Supra*, pp. 7, 8. This law was in full force when this contract in controversy was made. Its provisions are too plain for controversy. It states the public policy of Illinois so plainly that there is no reasonable cause for misunderstanding it.

My contention is that the act of 1855 did not give to railroad corporations of Illinois power, as lessors, to lease out their railroads and franchises to railroad corporations of other States; but even if I am wrong in that interpretation of the act of 1855; even if it is true that this act did give to Illinois corporations the right to lease their roads to corporations of other States, still it cannot be doubted that the act of 1865 withdrew that

power and made it perfectly dormant, unless all the resident stockholders consented in writing to the making of such lease prior to the execution thereof. If, therefore, it be conceded that the act of 1855 gave all the power that counsel for appellee claimed for it, nevertheless, the potent fact remains that the act of 1865 repealed that power and in its place gave to Illinois railroad corporation a power, coupled with a condition precedent, the power not existing until the condition precedent was first performed. At the time this contract was made, the law, therefore, clearly was that an Illinois railroad corporation could not lease its road to a corporation of another State until after it had first procured the written consent of all the stockholders resident in Illinois. The law, furthermore, most emphatically pronounced and declared every lease made in violation of its provisions in this respect absolutely null and void. It is not claimed or pretended that the condition precedent set forth in this law was complied with prior to the making of the contract in controversy. It was contended in oral argument that the condition precedent in this law was solely for the protection of the stockholders resident in Illinois, and that, therefore, it cuts no figure as an announcement of the public policy of the State. This position is untenable. The law provides that any lease made, without first procuring this written consent, *shall be null and void*. Therefore, if the condition precedent was not performed, *this contract was absolutely void ab initio*. If it was absolutely void, the ratification of every stockholder could not give it validity. Abundant authorities have already been cited in support of this proposition. This law, with the condition precedent, must therefore be considered as an an-

nouncement of the *public policy* of the State and not simply for the protection of the individual stocknolders.

As further showing the public policy of Illinois, and in proof that it is and always has been what I claim it to be, I call particular attention to the act passed by the Illinois Legislature June 30, 1885.

This law expressly grants to Illinois railroad corporations the right to buy or lease railroads in other States, *but expressly prohibits Illinois corporations from selling or leasing their roads to corporattons of other States.*

By the first section of this act it is provided, "That all railroad companies now organized, or hereafter to be organized, under the laws of this State, which now are, or hereafter may be, in possession of and operating in connection with or extension of their own railway lines, any other railroad or railroads in this State, or in any other State or States, or owning and operating a railroad which connects at the boundary line of this State with a railroad in another State, are hereby authorized and empowered to *purchase* and hold in fee simple or otherwise, and to use and enjoy the railroad property, corporate rights and franchises of the company or companies owning such other road or roads, upon such terms and conditions as may be agreed upon between the directors and approved by the stockholders, owning not less than two-thirds in amount of the capital stock of the respective corporations becoming parties to such purchase and sale."

By the second section it is provided that Illinois railroad corporations may borrow money and issue their mortgage bonds therefor, and may increase their capital stock to enable them to pay for railroads so acquired by purchase "in fee simple or otherwise."

After granting these powers, and providing how they may be exercised, the act ends with the following very significant words:

"*And provided, further, that nothing in this act shall be so construed as to authorize any corporation, other than those organized in and under the laws of this State, to purchase or otherwise become the owner, owners, lessee or lessees of any railroad within the State.*" Laws of Illinois, 1855, pp. 230, 231.

If the Illinois Legislature intended by the act of 1855 to give to railroad corporations of Illinois the right to lease out their roads to railroad corporations of other States; or if the Illinois Legislature believed that any such construction could possibly be given to the act of 1855, would this emphatic prohibition have been enacted? The very fact that while the first section of the act of 1855 was left in force and unrepealed, this emphatic prohibition against allowing railroad corporations of other States to become either *owners* or *lessees* of railroads within the State of Illinois was enacted, is conclusive proof that the Legislature of Illinois never intended to grant any such power by the act of 1855.

The wording of this proviso shows clearly that the Legislature of Illinois has always intended, by its laws, to prohibit its railroad corporations from putting their roads and franchises into the possession of railroad corporations of other States. Hence, while giving to its corporations the right to buy or lease roads in other States, the Legislature carefully provided "that nothing in this act shall be so construed as to authorize any corporation" of another State to buy or lease railroads of Illinois.

This proviso is nonsensical and absurd if it is true

that the Legislature granted, and intended to grant, just this power to railroad corporations of other States by the act of 1855.

In view of the legislation of Illinois, to which attention has been called, I submit that it is clear that the Legislature of Illinois did not intend by the act of 1855 to give the power to Illinois railroad corporations to lease their roads and franchises to corporations of other States. I further submit that it is clear that the public policy of Illinois now is, and always has been, to *prohibit* Illinois railroad corporations from in any way dispossessing themselves of their property and franchises. The Special Private Act in behalf of the *I. & St. L. R. R. Co.* of March 11, 1869, proves this; the repeal of the act of February 28, 1854, and the repeal of the third section of the act of February 12, 1855, prove this; the act of February 16, 1865, proves the same, while the act of June 30, 1885, emphasizes the proof given by these other statutes, and contains a clear and unequivocal definition of the public policy of Illinois upon this point.

It is certainly true that it never was the public policy of Illinois to authorize its railroad corporations to lease and transfer their property and franchises to corporations of other States expressly prohibited from accepting such lease or transfer.

It cannot be denied that this Court has squarely decided that the statutes of Indiana have *never* authorized railroad corporations of Indiana *to become lessees of railroads in other States.* The decision is even stronger than this, and declares that the statutes of Indiana *prohibit the acceptance* by Indiana railroad corporations *of such leases or transfers* of roads in other States.

It is self-evident that this case involves the consideration of the public policy of both Illinois and Indiana. It seems equally clear that the contract in controversy is opposed to the clearly defined and well understood public policy of the State of Illinois, while the decision of this Court in *Penn. R. R. Co.* v. *St. L., A. & T. H. R. R. Co., supra*, leaves no room for argument as to the public policy of the State of Indiana.

But it is contended by counsel for appellee that the case of *Archer v. Terre Haute and Indianapolis Railroad Co.*, 102 Ill., 493, decides the contract in controversy to be legal and valid, and that that decision is conclusive and binding upon this Court as a rule of property established by the Supreme Court of Illinois.

It certainly cannot be claimed that this decision is in any degree binding upon this Court *as to its construction of Indiana statutes.* If, therefore, the decision is based upon an erroneous construction of Indiana statutes, it cannot be binding upon this court at all, and is not even entitled to serious consideration.

Again, this decision cannot be regarded as a rule of property, or as, on that ground, binding upon this Court, except upon the *exact point* necessarily involved in the decision. If the Supreme Court of Illinois, in deciding a case involving one single point, strays away from that point and enters upon the construction of statutes of Illinois and Indiana not necessarily involved in the single point presented for decision, and undertakes to pass upon the validity of contracts, the validity of which need not be questioned or considered in order to decide the only question before the Court, all such parts of the decision are not binding upon this, or any other, Court. All that can ever be binding as authority

is the decision upon the exact point involved in the case presented for decision.

The case of *Archer v. Terre Haute and Indianapolis Railroad Co., supra*, did not necessarily involve the construction of the statutes of Indiana and Illinois relating to the rights of railroad corporations of the respective States to become lessors or lessees of each other's railroads. It did not necessarily involve a decision upon the validity of the contract now in controversy. The *only* question actually involved in the case was whether the *St. L., V. & T. H. R. R. Co.* had parted with the *actual ownership* of its property, so that that property was no longer subject to levy and sale for taxes levied against that corporation. That was the *only* question the record presented to the Supreme Court for decision.

An examination of the case as reported will verify these statements.

Counsel for the *T. H. & I. R. R Co.* certainly knew the point presented for decision, and knew the exact ground upon which they based their right to be relieved from the payment of taxes. Their position is stated by themselves, and appears on page 497 of the report in these words:

"That contract vested in appellee the *absolute ownership* of the rolling stock or equipment received by it under the contract.

"The Terre Haute and Indianapolis Railroad Company acquired this title to the possession of the property embraced in this contract, free from the lien of taxes assessed against the capital stock of the St. Louis, Vandalia and Terre Haute Railroad Company in 1873, 1874 and 1875."

The positions taken by counsel for Archer appear on page 496 of the report, and clearly show that the construction of the statutes of Indiana and Illinois and the validity of the contract were not necessarily involved, because even if the contract was all that counsel for *T. H. & I. R. R. Co.* claimed for it, a valid lease for 999 years—still the ownership of the property remained in the *St. L., V. & T. H. R. R. Co.*, and was subject to the taxes. They said:

"A foreign corporation has not the right to take control of the rights, property and franchises of a domestic corporation, and place itself, by lease or otherwise, between the taxing power and its property. * * * Lessees of railroads have always been held responsible for the obligations of the lessors, when those obligations affect the public."

On page 499 Mr. Justice Scott clearly shows that the only point before the Court was whether the *ownership* of the property had passed from the *St. L., V. & T. H. R. R. Co.* He then enters upon a discussion of the instrument, and decides that it cannot be a lease, *because, if a lease, it is void* under the act of February 16, 1865.

It does not seem to have occurred to Mr. Justice Scott that it was possible for the corporations making this contract to undertake to violate their charters by entering into a contract they had no authority to make. He seems to have felt it incumbent in some way to hold the contract valid, and since it was palpably absurd to hold it valid as a *lease*, he concluded to hold it valid as a connecting contract.

On page 502 we find this statement: "It will be noticed that the parties themselves treat the instrument

signed by them as a 'contract' or 'lease,' and in the body of the writing the words 'lease' and 'lessee' are used; *but it will hardly bear the latter definition, and yet find any sanction in the law for the making.*"

Then, after showing that if a lease, it was in direct violation of the act of February 16, 1865, the decision proceeds to dispose of the position assumed by counsel for the *T. H. & I. R. R. Co.*, that under the thirteenth section of the act of 1867, amending the charter of the *St. L., V. & T. H. R. R. Co.*, —Record, p. 61,— this contract amounted to a consolidation, in these words:

"It is plain that under this amendment to its charter the company could only do one of two things; either consolidate its road with another railroad in this State or in the State of Indiana, or make an agreement for connection with such road, so as to secure a continuous line. The agreement of February 10, 1868, was not for the consolidation of the roads of the companies signing it. Both corporations retained their separate existence, and it does not appear it was ever contemplated the two roads should be merged into one, and both corporations pass to one management. The very terms of the agreement are inconsistent with the idea of consolidation"

By these two statements of the decision the Court decided, *First*, That if the contract in controversy is a *lease*, it is *void*, because made in violation of the act of February 16, 1865; *Second*, That the contract does not amount to a consolidation.

Having disposed of these two points,—neither of which was necessarily involved in the determination of the point submitted for decision,—the opinion proceeds thus:

"It follows, then, it was simply a contract for connecting the railroads of the respective companies, so as to secure a continuous line between distant terminal points."

Why did it so follow? Simply because the contract could not be held valid on any other basis.

It was not necessary for the Court to hold the contract valid at all; its validity was not in issue. It was not necessary to pass upon the validity of this contract in order to decide the only point before the Court.

What difference did it make, as to the question to be decided, whether this instrument was a lease or a connecting contract, or whether it was valid or invalid?

If it had been held a valid lease it would not have carried the ownership of the property out of the *St. L., V. & T. H. R. R. Co.* so as to exempt it from levy for taxes one particle more than a connecting contract would accomplish that end. Mr. Justice Scott virtually admits this, on page 504, in these words:

"The fact that the possession and the use are parted with for a period of such duration, should the contract be performed, as that the tangible property would of necessity become worthless, *does not change the character of the transaction.*"

Consider for a moment the positions taken by the Court:

1. It is not a lease, because if it is it must be held void under the act of 1865.

2. It is not a consolidation, because the instrument shows on its face that no consolidation could take place under it.

3. *Therefore* it is simply a connecting contract! This is the argument in brief.

Here is an instrument transferring to the *T. H. & I. R. R. Co.*, for a stipulated consideration, payable semi-annually, absolute possession and control of all the railroad, property, equipment, rights and franchises of the *St. L., V. & T. H. R. R. Co.* for 999 years, held to be an instrument of less dignity than a lease—a mere connecting contract. And this is held, too, in a case, the decision of which did not require any construction of the statutes of Indiana and Illinois, and did not even require the question of the validity of the contract to be considered or decided.

Why call it a connecting contract? Connecting contracts are supposed to be made by and between railroad corporations, *both of which are operating their own lines*, for convenience, and to insure rapid transit, by making arrangements for the hauling of each other's trains as solid trains over each other's roads. This instrument has no vestige of a connecting contract about it. Under it the *St. L., V. & T. H. R. R. Co.* possesses no railroad, possesses no franchises, operates no road, exercises no franchises. The *T. H. & I. R. R. Co.* possesses and operates the entire railroad, property and franchises of the *St. L., V. & T. H. R. R. Co.*, and leaves it possessed of nothing except its name and corporate organization. To hold that this Court is bound by such statements as these, found in an opinion in which they are not needed in the full determination of the only point before the Court, would be a burlesque on law and justice.

The real point in the case, and the only point presented for decision, is correctly decided in these words, which words again contradict the theory that this is a

connecting contract, for no connecting contract would require or permit the *St. L., V. & T. H. R. R. Co. to part with the entire use of its franchises.* I quote from page 504 of the report.

"The franchise, the privilege of which is contracted for, is property as enduring as the contract itself. It would hardly be insisted the company had, by its contract with complainant, parted with the ownership of the franchises conferred upon it by the State. It is, therefore, clear that the ownership of the rolling stock and franchise remained in the company, subject only to the management by complainant consistently with the terms of the contract. It is still the property of the tax-debtor, and distraining the tangible property of the company for the payment of taxes is, in no sense, taking complainant's property to pay taxes owing by another company."

This is the real decision of the case before the Court. All the other propositions advanced and discussed are foreign to the case.

A single statement, taken from page 503 of the report, proves conclusively that all of this decision relating to the construction of the State statutes, and the construction given to the contract in controversy, is based upon an erroneous assumption regarding the statutes of Indiana. The statement is as follows: "Both parties signing the agreement had full authority from the States creating such corporations to make such an agreement, and placing that construction upon it, the contract is valid, *otherwise it would be void, because ultra vires.*"

This Court is certainly not bound by propositions, discussions or determinations not necessarily involved in the decision of the case, and especially is this true

when such propositions, discussions and determinations are based upon an assumption which this Court has clearly decided to be erroneous in so for as it assumes to construe the statutes of Indiana. This same case was cited and pressed upon the attention of this Court in oral argument, and by briefs of counsel for both sides in the case of *Penn. R. R. Co., et al.*, v. *St. L., V. & T. H. R. R. Co., supra*, but it did not prevent this Court from declaring the contract involved in that case utterly void, because the statutes of Indiana did not give the Indiana corporation the power to accept such a contract, notwithstanding the fact that the Legislature of Illinois had, by special act, ratified and confirmed that contract, and, in order to give it unquestioned validity, had created the *I. & St. L. R. R. Co.* a corporation of Illinois in respect to the railroad and property covered by that contract.

It must also be remembered that the *Archer case* is a *revenue* case. The true weight and importance to be given to such decisions is well stated by Mr. Justice Miller in *Thomas* v. *Railroad Co.*, 101 U. S., 85, and again in *Penn. R. R. Co., et al.*, v. *St. L., V. & T. H. R. R. Co.*, 118 U. S., 313.

I submit that the *Archer case* does correctly decide that the contract in controversy here did *not* convey the absolute ownership of the railroad and property of the *St. L., V. & T. H. R. R. Co.* to the *T. H. & I. R. R. Co.*, so as to exempt that property from levy for collection of taxes, and that the contract did *not* effect a consolidation of the two companies. Both these points are in substance one and the same.

I further submit that this is *all* that was decided by that case. I further submit that it is not binding

upon this Court as to any other proposition discussed or passed upon in the decision.

It was contended by counsel for appellee, at the hearing in the Circuit Court, that the first and second sections of the Indiana statute of February 23, 1853, —Record, p. 98—gave to the *T. H. & I. R. R. Co.* power to consolidate with any railroad company of Illinois owning a railroad extending to the State line of Indiana, and further gave to that corporation the right *to extend its railroad* into or through the State of Illinois, under such regulations as were prescribed by the laws of Illinois; that the *St. L., V. & T. H. R. R. Co.* owned a road extending to the Indiana State line; that the Illinois act of February 12, 1855,—Record p. 97—prescribed the regulations under which the *T. H. & I. R. R. Co.* could *extend its railroad* across the State of Illinois; and that by this contract the *T. H. & I. R. R. Co.* did *extend its railroad* across the State of Illinois.

In support of this argument the case of *Branch* v. *Jesup*, 106 U. S., 468, is cited, in which the Court held that the power to consolidate is greater than, and includes, the power to sell.

It is a sufficient answer to this contention to call the attention of the Court to the fact that the contract or lease here in controversy on its face shows that no consolidation could by any possibility take place under it. It expressly provides for keeping in existence and maintaining, the corporate organization of the appellant and even expressly provides that the appellee shall, in certain contingencies, furnish to the appellant the necessary money with which to maintain its corporate organization. That a consolidation would completely and forever extinguish the corporate organization of the *St.*

L., V. & T. H. R. R. Co. is clearly decided by the decision in the case of *Branch* v. *Jesup, supra*, cited by counsel in support of their theory of extension by consolidation.

It must further be borne in mind that the Illinois act of February 12, 1855, does not give to Illinois railroad corporations any right *to consolidate with, or sell to, railroad corporations of other States.* No such powers can by any possible construction be found in it.

This proposition of counsel for appellee requires such a construction to be given to the Illinois act of February 12, 1855, as will make it grant to the *St. L., V. & T. H. R. R. Co.* power to sell its road and franchises to the *T. H. & I. R. R. Co.*, or to consolidate with that company. The Illinois act of February 12, 1855, does not grant either of these powers.

The Indiana statutes, quoted and relied on by counsel in support of this proposition, were all, without exception, cited, commented upon, and pressed upon the attention of this Court in the case of *Penn. R. R. Co. et al.*, v. *St. L., A. & T. H. R. R. Co., supra*, in support of precisely the same position here assumed by counsel for appellee.

After carefully considering them all, this Court, speaking by Mr. Justice Miller, said: "We have very carefully examined this petition, and while on one of the main points in the case, namely, the statutory authority of the Indianapolis and St. Louis Railroad Company, under the laws of Indiana, to make the lease, which was the foundation of the suit, there are some other statutes and some other decisions of the State and the State Court cited, we do not think they invalidate the ground on which the decision of this Court at the last term rested.

"It was said in that opinion that there was no decisive or conclusive expression of opinion on that subject by the Supreme Court of Indiana, and that this Court was, therefore, compelled to exercise its own judgment and follow it in deciding the case. We are not able to see in the cases cited for the first time in this petition anything which modifies this proposition.

"The same may be said of the statutes specially relied on in the petition. There is, in our opinion, no authority found in them for the lease by the defendant company of the entire road, property, franchise, powers and control of the plaintiff's road for ninety-nine years." 118 U. S., 633, 634.

That decision certainly decides and settles the question that these statutes did NOT give to Indiana railroad corporations power to make such contracts as the one here in controversy, by whatever name it may be called.

If these statutes do not give Indiana railroad corporations the power to even *accept a lease* of a railroad in another State, they certainly do not grant the *greater* power to put far more capital and income at risk by the *purchase* of a railroad in another State. But even if they did, no law of Illinois ever authorized the appellant to *sell* its railroad and corporate franchises to the appellee.

It will be observed that the Circuit Court, in the written opinion filed, put great stress upon this proposition of appellee's counsel, which may, for lack of better name, be called the *extension theory*. Record, pp. 99, 100.

Happily the recent decision of this Court in *Central Transportation Co.* v. *Pullman's Palace Car Co.*, 11 Supreme Court Rep., pp. 482, 483, contains a clear and decisive statement regarding the decision in *Branch* v.

Jesup, *supra*, and conclusively shows that it was based solely upon the peculiar and unusually broad powers given by its charter to the lessor company involved in that litigation. In the opinion Mr. Justice Gray said:

"In *Branch* v. *Jesup*, Mr. Justice Bradley, delivering judgment said: 'Generally, the power to sell and dispose has reference only to transactions in the ordinary course of business incident to a railroad company; and does not extend to the sale of the railroad itself, or of the franchises connected therewith. Outlying lands, not needed for railroad uses, may be sold. Machinery and personal property may be sold. But the road and franchises are generally inalienable; and they are so, not only because they are acquired by legislative grant, or in the exercise of special authority given, for the specific purposes of the incorporating act, but because they are essential to the fulfillment of those purposes; and it would be a dereliction of the duty owed by the corporation to the State and to the public to part with them.' And a lease from one railroad corporation to another was upheld in that case, *only because the lessor had by its charter express authority, not only to purchase, hold, and convey property, real and personal, and to connect its road with any other road, but also to incorporate its stock with that of any other company*, which, it was observed, 'contemplates not only the possible transfer of the railroad and its franchises to another company, but even the extinguishment of the corporation itself, and its absorption into a different organization. The greater power of alienating or extinguishing all its franchises, including its own being and existence, contains the lesser power of alienating its road, and the franchises incident thereto, and necessary to its opera-

tion. Its power of alienation and sale extends to a class of subjects to which it does not ordinarily apply.' 106 U. S., 468, 478, 479."

At the hearing in the Circuit Court counsel for appellee advanced and urgently pressed this proposition, viz.: That by the *comity* between States, or by express legislative license, a corporation of one State might *greatly enlarge its powers* by doing business in another State than that of its creation. In other words, that the appellee *acquired powers* by doing business in Illinois which it did not possess in Indiana. This might properly be called the theory of *enlargement of corporate powers by migration.*

This position was assumed by counsel for appellee, in order to get out from under the clear decision of this Court that Indiana railroad corporations are not permitted by their charters and the statutes of Indiana to enter into such contracts as the one here in controversy. In order to give this theory any force, counsel for appellee are forced to assume the further position that the fact that the statutes of Indiana prohibit Indiana railroad corporations from making such a contract as this, *makes no difference whatever in this case*, because the contract is to be performed in Illinois, and because they claim that Illinois law grants Indiana railroad corporations power to make such a contract, which claim I deny.

This is, in effect, claiming that appellee, as a corporation of Indiana, can make and perform in Illinois a contract which it would be *unlawful* for it to make or perform in Indiana. This proposition I deny. No corporation of Indiana can acquire or possess power to do in Illinois what is prohibited by its charter and the statutes of Indiana.

Could a railroad corporation of Indiana put its capital and funds at risk by entering upon the business of banking, mining or manufacturing in Illinois, simply because Illinois law gave it license so to do? No Court ever so decided. An unbroken line of decisions confronts this proposition as utterly untenable. It is true that a corporation of Indiana cannot do anything in Illinois except by comity or express license. But this is only saying that the laws and charters of Indiana have no extra-territorial force.

When Illinois permits an Indiana corporation to carry on its business in the State of Illinois, such license simply permits it to do in Illinois what it might lawfully do in Indiana.

In *O. & M. R. R. Co.* v. *I & C. R. R. Co.*, *supra*, Judge Storer well said:

"It must be granted the foreign corporation is confined to the corporate powers granted by the State which creates it, and can claim nothing more."

This Court has settled the law against this proposition of appellee's counsel.

In *Canada Southern R. R. Co.* v. *Gebhard*, 109 U. S. 537, the law is clearly announced by Mr. Chief Justice Waite as follows:

"A corporation 'must dwell in the place of its creation, and cannot migrate to another sovereignty' (*Bank of Augusta* v. *Earle*, 13 Pet. 588), though it may do business in all places where its charter allows and the local laws do not forbid. *Railroad* v. *Koontz*, 104 U. S. 12. But wherever it goes for business it carries its charter, as that is the law of its existence (*Relf* v. *Rundel*, 103 U. S. 226), and the charter is the same abroad that it is at home. *Whatever disabilities are placed upon*

the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. A corporation of one country may be excluded from business in another country (*Paul* v. *Virginia*, 8 Wall. 168), but, if admitted, it must, in the absence of legislation equivalent to making it a corporation of the latter country, be taken, both by the Government and those who deal with it, *as a creature of the law of its own country*, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation."

To cite further authority on this point would be superfluous.

But it is claimed by counsel for appellee that the statutes of Indiana do not *prohibit* the making of such a contract, but simply fail to affirmatively grant the power to make it. My answer to this is that the law is clear and plain, as established by unnumbered decisions, that all powers not granted to corporations are *prohibited*.

Mr. Justice Miller, in *Penn. R. R. Co. et al.* v. *St. L., A. & T. H. R. R. Co.*, 118 U. S. 307, states the rule thus:

"Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the *exclusion of all others*."

V.

EVERY ESSENTIAL POINT AND PRINCIPLE INVOLVED IN THE CASE AT BAR, AS TO THE VALIDITY AND EFFECT OF THE PRETENDED LEASE, IS COMPLETELY COVERED AND DE-

CIDED BY THIS COURT IN ITS DECISION IN *Penn. R. R. Co. et al.* v. *St. L., A. & T. H. R. R. Co.*, 118 U. S., 290 AND S. C. ON PETITION FOR REHEARING, 118 U. S., 630. THERE IS NO POSSIBILITY OF EVADING OR IGNORING THAT FACT. UNDER THAT DECISION THIS PRETENDED LEASE MUST BE HELD ULTRA VIRES, VOID AND ILLEGAL BECAUSE OPPOSED TO PUBLIC POLICY.

Whatever view may finally be taken by this Court of the laws and public policy of the State of Illinois, and whatever the Court may finally hold as to the power of the *St. L., V. & T. H. R. R. Co.* to enter into this contract, still the contract should be held illegal and absolutely void, because the charter of the *T. H. & I. R. R. Co.* and the statutes of the State of Indiana prohibit the making or accepting of such a contract. This point is definitely settled by the decision in the case of *Penn. R. R. Co. et al.* v. *St. L., A. & T. H. R. R. Co.*, 118 U. S. 290, *and same case on petition for rehearing*, 118 U. S. 630.

Whether this decision is right or wrong is not a debatable question. It is the law settled, established and announced by this Court after two thorough and careful examinations of all the statutes of Indiana, and the decisions of the Supreme Court of Indiana, bearing upon the question. The Legislature of Indiana has passed no new statute on the subject. The public policy of the state remains the same as when this decision was rendered. To meet the requirements of this decision many millions of dollars worth of railroad property have changed ownership, and been so re-organized as to obey the law as settled by it. The very eminent counsel for appellee have subjected this decision to the severest scrutiny in the vain hope of finding some loop-

hole of escape from its conclusive and decisive effect upon their theory of defence.

After exhausting their utmost ingenuity, they have been able to suggest only two possible points of distinguishment between the case passed upon in this decision and the case at bar. These two points are;

1. Counsel for appellee claim that this decision is not in point, because in the case it decides, the railroads of the two contracting corporations *did not meet at the Indiana State line.*

2. Counsel for appellee claim that this decision is not in point, because they claim that the contract between the Indiana and Illinois railroad corporations involved in the case in which this decision was rendered, was clearly a lease, while they claim that the contract involved in the case at bar is not a lease.

No other possible distinguishment between the two cases has been suggested, and from that fact I may very safely assert that no other possible point of difference exists.

A careful examination will demonstrate that neither of these two points of difference exists. I will discuss these two points in the order in which they are above stated.

It is true that the railroad of the *St. L., A. & T. H. R. R. Co.* extends from East St. Louis to Terre Haute, —the extension in Indiana from the State line to Terre Haute being some ten or twelve miles in length. But it is equally true that this extension into Indiana was built, and is maintained, controlled and operated under the *Illinois charter creating the St. L., A. & T. H. R. R. Co.*, and under the statutes of Illinois governing and controlling that Illinois corporation. This was done

under a special act of the Legislature of Indiana giving to the *St. L., A. & T. H. R. R. Co.* license to extend its railroad from the State line to Terre Haute, under its charter and corporate powers *as an Illinois corporation.* This Indiana statute, giving this license, is too plain for any misconstruction. It was passed when the name of the present *St. L., A. & T. H. R. R. Co.* was the "Terre Haute and Alton Railroad Company."

It is entitled "An act to extend the Terre Haute and Alton Railroad," was approved February 11, 1851, and reads as follows:

"SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That the Terre Haute and Alton Railroad Company, as chartered by the Legislature of the State of Illinois, and approved of January 28th, 1851, *and by and under an act to provide for a general system of railroad incorporations in said State*, in force November 6th, 1849, be permitted to extend their said railroad from the eastern line of the State of Illinois, through the State of Indiana, to the City of Terre Haute, and into the same; and that said corporation shall have all the rights, powers and privileges *in taking land* and doing all things necessary to carry on and maintain their railroad perpetually, as granted to said corporation by the *above acts by the Legislature of the State of Illinois.*"

By this law the *St. L., A. & T. H. R. R. Co.* remained solely an Illinois corporation *as to its entire road*, and, in law, occupies precisely the same position it would occupy if its road ended at the State line.

This point is clearly decided in the decision under consideration. I quote from the decision.

"It does not seem to admit of question that a corporation of one State, owning property and doing busi-

ness in another State by permission of the latter, does not thereby become a citizen of this State also. And so a corporation of Illinois, authorized by its laws to build a railroad across the State from the Mississippi River to its eastern boundary, may, by the permission of the State of Indiana, extend its road a few miles within the limits of the latter, or, indeed, through the entire State, and may use and operate the line *as one road*, by the permission of the State, without thereby becoming a corporation or a citizen of the State of Indiana." 118 U. S., 295, 296.

I will now show that the *I. & St. L. R. R. Co.*,—the Indiana corporation entering into the contract involved in this decision,—occupies in law, as to its power to make such a contract, precisely the same position it would occupy if its road extended to the State line instead of ending at Terre Haute. To do this, it will only be necessary to quote a small part of the Articles of Association of the *I. & St. L. R. R. Co.*, and two sections of the statute of Indiana, approved May 4, 1869. The Articles of Association contain the following statement regarding the purposes of the corporation and the franchises covered by said Articles, to-wit:

"To build, construct, operate and maintain a railroad from Indianapolis, in the State of Indiana, to a point on the line dividing Indiana and Illinois at or near where the *St. L., A. & T. H. R. R.* intersects the same.

"The name of the place from which the proposed road is to be constructed is Indianapolis.

"The place to which the proposed road is to be constructed is on the line dividing Indiana and Illinois at or near the intersection of the same with the *St. L., A. & T. H. R. R.*"

This part of the articles of incorporation is quoted to prove that the *I. & St. L. R. R. Co.* comes directly under the Indiana statute of May 4, 1869. I here quote the title of that act and the first and fourth sections of it:

"AN ACT to enable railroad companies which have formed articles of association, naming the places from and to which the proposed roads are to be constructed, to perfect their lines by connections, to preserve their franchises, and to define the extent, character and privileges of the same.

(Approved May 4, 1869.)

"Section 1. (Sec. 3967 R. S. Ind. 1881.) *Be it enacted by the General Assembly of the State of Indiana*, That any railroad company organized and incorporated under the general laws of this State, for the purpose of building a railroad from any point in the State to a point on the State line, shall be authorized to connect with any other railroad already made from such point on the State line, at any convenient point of intersection within this State.

"Sec. 4. (Sec. 3970 R. S. Ind. 1881.) Any railroad company organized as in the first section of this act mentioned, and completing its connection with its terminal point on the State line by connection with the railroad of another company, as authorized by this act, *shall be taken and deemed to be a company owning and constructing a road to the State line*, and shall possess all the rights, franchises and privileges, and be subject to all the obligations and duties of a railroad company owning a road to the State line, as prescribed by any general law of this State, not inconsistent with the provisions of this act."

In view of these statutes it is certain, to the point

of absolute demonstration, that in *Penn. R. R. Co. et al.* v. *St. L., A. & T. H. R. R. Co., supra*, the *I. & St. L. R. R. Co.* stood before the Court on precisely the same footing it would have occupied if its road had extended to the State line, and that it possessed every right and power pertaining to an Indiana railroad corporation whose road did extend to the State line. It is equally clear that the *St. L., A. & T. H. R. R. Co.* stood before the Court on precisely the same footing it would have occupied if its road had ended at the State line. The part of its road extending from the State line to Terre Haute is not an Indiana railroad, owned by an Indiana corporation and governed by Indiana laws, but it is an Illinois railroad, owned by an Illinois corporation and governed by Illinois laws, even including the power to exercise the right of eminent domain pursuant to Illinois law. It is in every respect an Illinois railroad laid down on Indiana soil by license of Indiana law.

The *I. & St. L. R. R. Co.* and the *St. L., A. & T. H. R. R. Co.* therefore stood before the Court precisely as though their lines of railroad *met at the State line* instead of at Terre Haute. The decision shows that they were so regarded by this Court. The *St. L., A. & T. H. R. R. Co.* is repeatedly held to be "*exclusively an Illinois corporation*," and the *I. & St. L. R. R. Co.* is held to be as exclusively an Indiana corporation.

It is clear that the first point of difference claimed by the counsel for appellee as existing between the case at bar and the case decided by this decision does not exist.

The second point of difference claimed is that the

contract in the case at bar is not a lease, while it is claimed that the contract involved in this decision was clearly a lease.

The contract involved in the case at bar, has in it every element of a lease that can be found in the contract involved in this decision; in fact, it is far more like an ordinary lease than that contract is. I have already,—*supra*, pp. 61 to 69,—discussed the question whether the contract here in controversy is or is not a lease. My purpose here is to show that whether it is or is not a lease, *it is precisely the same kind of a contract as the one involved in the St. L., A. & T. H. R. R. Co. case.*

1. These two contracts are alike in their TERMS OF CONVEYANCE, except that the contract in the case at bar is much the stronger in its attempted conveyance of franchises.

CONTRACT IN ST. LOUIS, ALTON AND TERRE HAUTE CASE.

"AND WHEREAS, it is considered by the said parties hereto that their interests would be mutually promoted by having the said railroad, thus forming a continuous line from Indianapolis to East St. Louis, placed under one management and control, upon the terms and conditions hereinafter expressed: *Now*, therefore, etc. * * * The said party of the first part shall, will and may manage, operate and carry on the business of a certain railroad belonging to the party of the second part, and known as the principal or main line of the

CONTRACT IN THE CASE AT BAR.

"AND WHEREAS, It is desirable that the said lines, when connected, should be operated by the Terre Haute and Indianapolis Railroad Company as one road between Indianapolis and St. Louis, and the said Terre Haute and Indianapolis Railroad Company having proposed to LEASE and operate the said St. Louis, Vandalia and Terre Haute Railroad for a period of nine hundred and ninety-nine (999) years.

It is therefore agreed, first, That upon completion of the road between East St. Louis and the State line of Indiana, the Terre Haute and Indian-

St. Louis, Alton and Terre Haute Railroad, extending from Terre Haute, in the State of Indiana, to East St. Louis, or Illinoistown, in the State of Illinois, and also a certain branch thereof belonging to the party of the second part, and extending from a point on the said main line to Alton, in the said State of Illinois, for and during the period of ninety-nine years from the first day of June in the present year of our Lord 1867. * * * The party of the first part, operating the said railroads during the term aforesaid, shall, from time to time, have full authority to fix all rates of passenger fares and all freights on all business done on said main line of railroad, and the said Alton branch thereof, * * * and shall and may, at all times during the period of ninety-nine years aforesaid, demand, collect and receive any and all fares, charges, freights, tolls, rents, revenues, issues and profits of the said main line of railroad extending from Terre Haute to East St. Louis aforesaid, and of the said branch thereof to Alton aforesaid." Parts of Articles 1, 5 and 6, St. Louis, Alton and Terre Haute R. R. Co. contract, 118 U. S., 300, 301.

apolis Railroad Company shall take charge of and operate the same with its equipment, for a period of nine hundred and ninety-nine (999) years. * * * *It it further agreed*, That the Terre Haute and Indianapolis Railroad Company, AS LESSEE, shall enjoy all the rights, powers and privileges of the St. Louis, Vandalia and Terre Haute Railroad Company so far as the same may be needful to maintain and operate said railroad; also to impose and collect tolls and rates for transportation; and to do all other acts and things as fully and effectually as the said St. Louis, Vandalia and Terre Haute Railroad Company could do if operating said line. *Supra*, pp. 4, 5.

2. Both of these contracts provide for the payment of a *minimum* rent.

"It is hereby expressly agreed that the aforesaid payments shall amount, in each and every year, to at least four hundred and fifty thousand dollars, which is hereby agreed upon as a minimum for each and every year, and is to be paid absolutely, without reference to the percentage which it forms of the gross earnings of such year." Part of Article 7, St. L., A. & T. H. R. R. Co. contract, 118 U. S., 302.

"If the thirty-five (35) per cent. (by the amendment this should now read thirty per cent.) should, from any cause, not be sufficient in amount to protect the interest on mortgage bonds and sinking funds therefor, as they mature from time to time, together with the payment of taxes and the proper cost of maintaining organization, so that the rights of stockholders may be preserved, then, and in that event, the LESSEE shall advance for the company whatever amounts may be needed, to be accounted for under the yearly averages of this LEASE during the contract." *Supra*, pp. 4, 5.

The only difference between these provisions is that in the *St. L., A. & T. H. R. R. Co. lease* the parties ascertained in advance just how much it would take to pay their mortgage interest, taxes, etc., and put that ascertained amount into the contract as the minimum rent; while it the contract at bar the *T. H. & I. R. R. Co.* agreed to pay enough money to pay all mortgage interest, sinking fund money, taxes and cost of maintaining the corporate organization of the *S. L., V. & T. H. R. R. Co.*, whether thirty per cent. of the gross earnings did or did not amount to enough to make said payments.

3. Both contracts provide for a *maximum* rent in the same way. In each contract,—bearing in mind the amendment to the contract in the case at bar,—thirty per cent. of the gross earnings is to be paid to the corporation owning the road covered by the contract.

In the *St. L., A. & T. H. R. R. Co.* contract this thirty per cent. was scaled down to twenty five per cent. as to the excess of gross earnings above two million dollars per year, and to twenty per cent. as to the excess of gross earnings above three million dollars per year. 118 U. S., 302.

In the contract in the case at bar no provision for lowering the maximum rent is inserted, but that can make no difference in the legal effect of the contract, and in no manner distinguishes it from the *St. L., A. & T. H. R. R. Co.* contract, *supra*, pp. 4, 5, 6.

4. Both contracts provide a *fixed term* or period.

In the *St. L., A. & T. H. R. R. Co.* lease it was 99 years.

In the case at bar it is *999 years.*

5. The parties to the *St. L., A. & T. H. R. R. Co.* contract did not call their contract a lease; they named it an "Operating Contract," and it is so designated throughout the entire instrument. The words "lease" and "lessee" cannot be found anywhere in it.

In the case at bar the parties themselves intended their contract to be a lease. They called it a "*lease.*" The *T. H. & I. R. R. Co.* "proposed to *lease*" the *St. L., V. & T. H. R. R.*, and in the body of the instrument styles itself *lessee* of appellant's road and franchises.

In view of this comparison of these two contracts, it is worse than idle to claim that the contract involved in the case of *Penn. R. R. Co. et al.* v. *St. L., A. & T. H. R. R. Co., supra*, is "clearly a lease," and at the same time claim that the contract in the case at bar "is not a lease."

If the one is a lease the other is also, and if neither is a lease, still the fact remains that they are *contracts of*

precisely the same character, and have precisely the same *legal effect*. By these contracts the *St. L., A. & T. H. R. R. Co.* and the *St. L., V. & T. H. R. R. Co.*,—both being exclusively Illinois corporations,—undertook to convey to the *I. & St. L. R. R. Co.* and the *T. H & I. R. R. Co.*,—both being exclusively Indiana corporations,—their respective railroads, properties, rights and franchises, for fixed terms of long duration,—in the one case 99 years; in the other case 999 years. Both of these Illinois corporations thus undertook to strip themselves of their property and franchises and vest them, for long periods, in railroad corporations of Indiana.

The Court, in its decision in the case of *Penn. R. R. Co. et al.* v. *St. L., A. & T. H. R. R. Co.*, 118 U. S. 290, and *same case, on petition for rehearing*, 118 U. S. 630, has carefully considered one of these two contracts, and has clearly and unequivocally pronounced it VOID *and illegal, because opposed to public policy.*

With that decision before it, can this Court pronounce the other of these two contracts VALID?

The Circuit Court, in the written opinion filed, said:

"Although *Branch* v. *Jessup* is not expressly overruled by the case last referred to, and we are not convinced that it was intended to be overruled, we nevertheless feel obliged to hold that the defendant had no power under the Indiana act to make the contract involved in this suit, and that it is void as to the defendant for that reason alone." (Record, p. 100.)

If this lease is void because appellee *had no corporate power* to execute and accept it, then it is *void and illegal because opposed to public policy.* It has been hereinabove proved by unquestioned authority that a contract that is *ultra vires*, and illegal because opposed to public policy,

is utterly incapable of being made valid by ratification or part performance. It has further been established, if authority can establish any proposition, that the doctrine of *laches*, or equitable estoppel, has no application to contracts *absolutely and irretrievably void ab initio*. It has further been shown by abundant authority of unquestioned weight that a court of equity has jurisdiction to grant to appellant *affirmative* relief by decreeing the cancellation, and delivery up, of the void and illegal lease; and that appellant's remedy at law is not plain, complete and adequate.

Appellant prays that the decree of the Circuit Court may be reversed.

Respectfully Submitted,

J. T. Brooks,
Solicitor for Appellant.

John M. Butler,
Of Counsel for Appellant.

Hon. Lyman Trumbull,
Henry S. Robbins,
Perry Trumbull,
Of Counsel for Appellant.

Indianapolis, Ind., April 15, 1891.

APR 20 1891

Supreme Court of the United States.

IN EQUITY.

THE ST. LOUIS, VANDALIA AND TERRE HAUTE RAILROAD COMPANY,

Appellant,

against

THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY,

Appellee.

Appeal from the Circuit Court for the Southern District of Illinois.

Brief of George Hoadly, for Appellee.

Supreme Court of the United States.

THE ST. LOUIS, VANDALIA AND TERRE HAUTE RAILROAD COMPANY, *Appellant,* *against* THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY, *Appellee.*	In Equity.

APPEAL FROM THE CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS.

BRIEF OF GEORGE HOADLY, FOR APPELLEE.

Explanatory Statement.

Upon the filing of the original bill in this case (Record, pp. 1–15), a motion was made by the complainants for the appointment of a receiver and for injunction (p. 17), which, after full hearing, was denied by the Circuit Court (p. 35). The defendant then demurred to the bill (p. 36), on various

grounds, one of which was multifariousness. After full argument, the demurrer was sustained on the grounds of multifariousness, laches and want of equity. The opinion of Judge GRESHAM sustaining the demurrer begins on p. 94 of the Record. The bill was then amended so as to obviate the objection of multifariousness. The amended bill and exhibits are contained between pages 38 and 91. To this the demurrer was refiled on three grounds, *first*, want of equity; *secondly*, that the complainant has a complete remedy at law; *thirdly*, laches (p. 92). Thereupon, without further argument or opinion, final decree was entered sustaining the demurrer (p. 93), and dismissing the amended bill. Complainant appealed to this Court.

This explanation is proper because otherwise this Court might be at a loss to understand why, after the filing of the amended bill, which relieved the case from the objection of multifariousness, Judge GRESHAM is made to appear to have sustained the demurrer on that ground, and is also necessary to account for the appearance in the record of the voluminous affidavit, with exhibits, of William R. McKean (pp. 18–35), which was used on the hearing of the motion for the appointment of a receiver.

Premising the foregoing, I proceed to argue the propositions (in their inverse order) made by the demurrer.

ARGUMENT.

I.

The complainant is barred from recovery in this case by its own laches and acquiescence.

This suit was brought on the sixth day of July, 1887. Its object is to annul the lease of the St. Louis, Vandalia and Terre Haute Railroad, extending from the State line of Illinois and Indiana, near the City of Terre Haute, Indiana, westerly to the left bank of the Mississippi River, opposite St. Louis, a distance of 158 miles, executed February 16, 1868, and from that time continuously carried into execution until the filing of this bill, a period of more than nineteen years. The amended bill shows (p. 47, fol. 88), that :

"After the execution of said pretended lease, and as soon as the construction and equipment of said road of your orator had been completed as aforesaid, and on or about the first day of July, 1870, the said defendant, claiming the right so to do by reason of and under said pretended lease, entered into possession and assumed and took the complete control and use of all of your orator's said railroad. * * * and all other property of your orator of whatsoever name, nature, kind and description, and said defendant has from that time continuously to the present day retained and still retains the exclusive possession and control thereof, * * * has been continuously and now is exercising all the rights, powers and privileges of your orator under its said franchises, and has been and now is maintaining, operating, managing and controlling your orator's said railroad and other property and imposing, collecting and receiving

tolls and rates accruing for the transportation of passengers and freight over your orator's said road, and that the sum so received by said defendant and appropriated to its own use and that of its stockholders, from the tolls and other receipts of your orator's said property * * * now aggregate more than twenty-one million six hundred thousand dollars ($21,600,000)."

The *first* question presented is, whether a lease made by one railroad company to another, nineteen years before suit brought, under which seventeen years' continuous possession and use intervened between the completion of the leased road and the filing of the bill, may be annulled as *ultra vires* by a decree in equity, or whether the laches and acquiescence are so great as necessarily to remit the injured party to its legal rights and remedies, if any it have. It is idle to say that the complainant has just discovered its rights in the premises. True, this pretence is made. Complainant avers (fol. 92), that, when the lease was made, it was supposed by its president and directors and officers that—

"they had the lawful right to authorize the execution of and to execute the same, and your orator did not know until recently that said lease was null and void."

Ignorance of the law excuses no one.

Hunt vs. *Rousmaniere*, 8 Wheat. 174, s. c., 1 Peters, 1, 15.
United States Bank vs. *Daniel*, 12 Peters, 33.
Upton vs. *Tribilcock*, 91 U. S. 50.
Lamborn vs. *County Commissioners*, 97 do. 185.
United States vs. *Ames*, 99 do. 46.

The complainant was bound to know its rights at the time the contract was made, in 1868, and cannot, nineteen years afterwards, and after seventeen years possession, abandon the experiment of performance, and claim that the contract is invalid and void. This defence was properly raised by demurrer.

Wollensak vs. *Reiher*, 115 U. S. 96.
Graham vs. *Boston, Hartford & Erie R. R.* 118 U. S. 161.

Courts go further. It is held in *Sullivan* vs. *Portland & Kennebec R. R.* 94 U. S. 811, that they will apply this rule *sua sponte*.

Even if it be true that the contract between the parties amounts to a lease, and as such is void because not authorized by the laws of Indiana, or because not assented to by the Illinois stockholders, it does not follow that the equitable remedy here sought will be administered in favor of the Vandalia Company.

"*In pari delicto potior est conditio possidentis aut defendentis.*"

Equity requires diligence on the part of suitors who may apply for the remedies which it administers. Those who are not diligent are remitted to their legal remedies, and this is true even in cases where the equitable right is otherwise perfect.

I adopt the language of Mr. Pomeroy in his work on Equity Jurisprudence, section 418:

"Equity aids the vigilant; not those who slumber on their rights."

Mr. Pomeroy shows in the preceding and succeeding sections, that the defence of laches is a reason for refusing *equitable remedies*.

It is not a defence of right, but of remedy. It is a bar to relief, because relief is only administered in equity in favor of the diligent. At *law* it is granted to the negligent, provided they apply within the time fixed by the Statute of Limitations, or provided that statute be not pleaded, but, in *equity*, courts refuse this remedy, although the statutory period may not have elapsed, and although the defence be not made by demurrer, plea or answer

In Section 816, Mr. Pomeroy says:

"Acquiescence is an important factor in determining equitable rights and remedies, in obedience to the maxims:—He who seeks equity must do equity, and he who comes into equity must come with clean hands. Even when it does not work a true estoppel upon rights of property or of contract, it may operate in analogy to estoppel—may produce a *quasi* estoppel—upon the rights of remedy."

And again at Section 817:

"This form of *quasi* estoppel does not cut off the party's title, nor his remedy at law; it simply bars his right to equitable relief, and leaves him to his legal actions alone."

In *Smith* vs. *Clay*,* as reported in note to 3 Brown's Chancery cases, (*639), Lord Chancellor CAMDEN says at page (*640):—

*NOTE.—This case is also, but not as fully, reported in Ambler, 645. The reporter, in the note to 3 Brown's C. C. (*639), introduces it with the following prefatory words:

"The reporter having been favored with a more accurate note of Lord Camden's judgment in this case than has hitherto appeared in print, he flatters himself the publication of it will be acceptable to the profession, and has, therefore, inserted it."

"A Court of Equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this Court into activity but conscience, good faith and reasonable diligence. Where these are wanting, the Court is passive and does nothing. Laches and neglect are always discountenanced; and, therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this Court."

In *Brown* vs. *County of Buena Vista*, 95 U. S. 157, it was held that (syllabus) :—

"A Court of Equity will not relieve against a judgment at law, where the party seeking its aid has been guilty of laches or fault. Whether the time, which has elapsed since the discovery of the fraud set up as the ground of relief be sufficient to bar the remedy, is a question to be determined by the sound discretion of the Court."

In *Godden* vs. *Kimmell*, 99 U. S. 201, this Court held as follows (*syllabus*):

"In cases of concurrent jurisdiction, Courts of equity consider themselves bound by the Statutes of Limitation which govern Courts of law; in many other cases they act upon the analogy of the limitations at law; but even where there is no such statute governing the case, a defense founded upon the lapse of time and the staleness of the claim is available in equity where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights."

In *Coddington* vs. *Railroad Company*, 103 U. S. 409, it appeared, that, in 1866, the complainant had exchanged coupons, cut from first mortgage bonds of the defendant railroad company, for preferred stock. In 1869 the railroad and its franchise were

sold in proceedings for the foreclosure of the mortgage which secured these bonds and coupons. In 1877 this bill was brought to rescind the contract for the exchange of coupons for the preferred stock. This Court held the complainant's right to relief barred by laches and the Statute of Limitations. Mr. Justice MILLER says (page 412):

"We are of opinion that, both by reason of the Statute of Limitations and the general doctrine of laches, in failing to tender his certificates in due time and assert a rescission of the contract, the demurrer was well taken."

So stringent is this rule, that—

"it is not necessary, in order to let in a defense that the claim is stale, that a foundation should be made by any averment in the answer. If the case as it appears at the hearing is liable to the objection by reason of the laches of the complainants, the Court will, upon that ground, be passive and refuse relief."

See also:

Sullivan vs. *Portland & Kennebec R. R. Co.*, 94 U. S. 806.

Cressey vs. *Meyer*, 11 Sup. Ct. Reporter, (No. for Mar. 23, 1891), 387.

Hanner vs. *Moulton*, *ibid.* (No. for Mar. 30, 1891), p. 408.

Strongly to the same effect are the following cases:

Badger vs. *Badger*, 2 Wall. 87.

Boston and Providence Railroad Corporation vs. *New York and New England Railroad Company*, 13 R. I. 260–266.

Young vs. *Clarendon Township*, 132 U. S. 340.

Calhoun vs. *Millard*, 121 N. Y. 69.

See also High on Receivers, section 14.

II.

The complainant's remedy, if any, is at law, not in equity.

It was claimed at Circuit, and I suppose will be maintained here, that the contract between the two railroad companies was "illegal." Very much stress was put upon the supposed "illegality" of the execution by these parties of such a contract, whether called lease or not, and the debate between Judges COMSTOCK and SELDEN in the case of *Bissell* vs. *The Michigan Southern and Northern Indiana Railroad Companies*, 22 N. Y. 258, was referred to, and it was insisted that Judge SELDEN was right and Judge COMSTOCK wrong. Assuming this to be correct, it proves too much for my learned adversaries. If this contract be illegal, it cannot stand in the way of their recovery at law. On this theory the Terre Haute and Indianapolis Railroad Company is in possession of the property of another without right, and ought to surrender upon demand, and will be made to surrender in the proper action,—ejectment or its equivalent,—unless defeated by the application of the rule, "*in pari delicto potior est conditio possidentis aut defendentis.*" This maxim is as true in equity as at law, and has no relation to the choice of remedies.

This proposition extends the argument naturally to another branch of the defence.

That a bill which is substantially for ejectment cannot be sustained in equity is shown by the case of *Killian* vs. *Ebbinghaus*, 110 U. S. 568.

Forcible detainer will lie to recover the possession of a railroad.

R. R. vs. *Johnson*, 119 U. S. 608.

The rule that where the complainant's remedy is at law he cannot prosecute a bill at equity, will be enforced by Courts *sua sponte*.

Sullivan vs. *Portland & Kennebec R. R. Co.*, 94 U. S. 811.

Nor can this bill be sustained as a bill of peace, for a bill of peace cannot be filed by one out of possession.

Frost vs. *Spitley*, 121 U. S. 556.

It is to be observed that there is no averment of insolvency in this case, and no relief is sought on that ground.

See also High on Receivers, Section 365.

To the proposition that a bill *quia timet* cannot be filed by one out of possession it was sought to be answered at Circuit that:

"It is a rule that always yields to State statutes enlarging equity jurisdiction,"

and the statute of Illinois of 1869 (1 Starr & Curtis' Annotated Statutes, 419), was cited. It authorizes Courts to—

"hear and determine bills to acquire title and to remove clouds from the title to real estate, whether the lands in controversy are improved or occupied, or unimproved or unoccupied."

But this does not justify the filing of a bill to acquire title by a party out of legal and actual posses-

sion. In one sense, inapplicable in this case, it might be claimed that this statute alters the equity rule—viz.: in this, that it permits a bill to quiet title as to unoccupied lands; but this is only a nominal and verbal change of the rule, for vacant lands are always in *legal* possession of the party holding the paper title, and this statute, therefore, if it change the rule at all, only does so by preventing the party holding the paper title from defeat in his attempt to quiet such title against a cloud by the fact that the land is unimproved. It does not, however, prevent his defeat if the fact be that the land is adversely occupied as it is here, if it be "illegally" occupied, nor does the residue of the section assist the contention of our learned adversaries, but on the contrary, tends to defeat it.

"And the taking possession of such lands after the commencement of suit by the party claiming the title or the adverse title, or any one under or through such person or persons shall not, in any wise, affect the complainant's right to a final decree upon his bill."

This does not, in any way, prevent the taking possession of such lands *before* the commencement of the suit from having its natural, proper and well settled equitable effect to defeat the bill to acquire title. The principle of equitable jurisprudence is as well settled as anything can be, and it is this, to wit: Where lands are held adversely, the complainant must establish his right at law by prosecuting at least one successful ejectment, and thus uniting legal seizin and actual possession. When this has been done he may file his bill. Before this has been done he cannot recover, and a statute which prevents the taking possession of unimproved lands, after the commencement of a suit to quiet title,

from having the effect to defeat the complainant's right to final decree, so far from impairing the equitable rule, confirms and strengthens it.

And so the Supreme Court of Illinois holds, in cases arising since the passage of the Act of 1869.

Hardin vs. *Jones*, 86 Ill. 313.
Gage vs. *Abbott*, 99 do. 366.
Oakley vs. *Hurlbut*, 100 do. 204.
Gage vs. *Parker*, 103 do. 528.
Gould vs. *Sternburg*, 105 do. 488.
Gage vs. *Curtis*, 122 do. 520.
Wetherell vs. *Eberle*, 123 do. 666.
Gage vs. *Hampton*, 127 do. 87.
Lundy vs. *Lundy*, 131 do. 138.

That where money has been paid upon an *ultra vires* contract the remedy is at law, and not in equity, see cases cited under next point of this brief, (*post* pp. 14, 16.)

Complainant's claim for an accounting, (fol. 90,) does not convert this into an equity case. If appellant's possession were "illegal," its operation of the railroad was likewise "illegal," and complainant's remedy, if any, is in trespass for mesne profits.

III.

Ultra vires is a defence, not a ground of attack.

While a defendant may resort to the plea of *ultra vires*, it is not believed that the complainant can assert any such right.

Ultra vires is a defense, not the basis of an affirmative claim, especially in equity, except in a very small class of cases.

The law upon the subject is settled by the de-

cision of this Court in the case of *Spring Company* vs. *Knowlton*, 103 U. S. 49, the first clause of the *syllabus* of which is as follows (italics mine) :—

"A party to a contract, the making of which, although prohibited by law, is not *malum in se*, may, while it remains executory, rescind it and recover money by him advanced thereon to the other party *who had performed no part thereof*."

Spring Company vs. *Knowlton* was an action, not in equity, but at law.

An examination of the case shows that the right to rescind in cases of this kind extends only to the party who has performed, in suits against the party who has not performed. It is stated thus by Mr. Justice MELLISH, in the Court of Appeals, (*Taylor* vs. *Bowers*, 1 Q. B. Div. 291):

"If the illegal transaction had been carried out, * * * the plaintiff himself, in my judgment, could not afterwards have recovered the goods. But the illegal transaction was not carried out. It came wholly to an end. To hold that the plaintiff is entitled to recover does not carry out the legal transaction, but the effect is to put everybody in the same situation as they were before the illegal transaction was determined upon, and before the parties took any steps to carry it out. That, I apprehend, is the true distinction in point of law. If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out, but if he waits till the illegal purpose is carried out, or if he seeks to enforce the illegal transaction, in neither case can he maintain an action. The law will not allow that to be done."

The question is stated by Mr. Justice WOODS for this Court (103 U. S., page 58), thus:

"Whether, conceding the contract to be illegal, money paid by one of the parties to it in part performance, can be recovered, the other party not having performed the contract or any part of it, and both parties having abandoned the illegal agreement before it was consummated."

Upon this question, the conclusion quoted *supra* from the *syllabus* was reached. It follows that if the contract has been executed by both parties, as here, or by the defendant alone, no affirmative action can be taken by any Court for its rescission.

The subject was again referred to in *Railway Companies* vs. *Keokuk Bridge Co.*, 131 U. S. 371, in the opinion of Mr. Justice GRAY, from which I make the following quotation (page 389, italics mine):

"It is proper to add that our judgment does not rest in any degree upon the ground suggested in argument, that the bridge contract and lease having been executed, the Pittsburgh and Pennsylvania Companies, having received the benefits of them, are estopped to deny their validity; because, according to many recent opinions of this Court, a contract made by a corporation which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into execution become lawful and valid, *but the proper remedy of the party agreed is by disaffirming the contract, and suing to recover, as on a quantum meruit, the value of what the defendant has actually received the benefit of.*"

In the case at bar the contract has been fully executed by both parties, that is, on the theory that it is a lease, because the execution of a lease is the grant of an estate, and this was accomplished and completed by delivery of the lease and of possession under it. The fact that there is to be continuing performance on the part of the defendant in the

nature of the payment of rent (if such it be called) is simply the result of possession and does not prevent the rule from attaching.

Even if we assume that Courts of equity would administer the rule established in *Spring Company* vs. *Knowlton*, it would not help the plaintiff, for the reason that the doctrine of that case limits the recovery to cases in which the plaintiff is the only party who has made payment or performance, and where, therefore, the defendant being already in *statu quo*, the plaintiff would also be restored to *statu quo* by recovery.

The opinions of Judges are always limited by the requirements of the cases before them. Every lawyer must be sensible of the danger of applying of the language of Courts, used with reference to one class of facts, to another more or less different. Mr. Justice MILLER states this with great force in *Woodruff* vs. *Parham*, 8 Wall. at page 138.

See also *The Victory*, 6 Wall. 382.

Thomas vs. *Railroad Co.* 101 U. S. 71, was an action in which the defense, not the attack, of *ultra vires* prevailed, and Mr. Justice MILLER's language has reference to the right of a defendant to object to further performance of a contract, and not to the supposed duty of a Court to rescind at the instance of a wrongdoer.

The same remark may be made of *Pennsylvania Co.* vs. *St. Louis, Alton & Terre Haute R. R. Co* 118 U. S. 290, and I believe it to be generally true in equity, and also at law except in the very limited class of cases of which *Spring Co.* vs. *Knowlton* is an instance.

The same is true of the latest examination of the subject by this Court; *Central Transportation Co.* vs. *Pullman's Palace Car Co.* 11 Sup. Ct. Rep. 478, (No. for March 30, 1891).

I quote from the latter part of Mr. Justice GRAY's opinion, (p. 488, italics mine:)

"A contract of a corporation, which is *ultra vires* in the proper sense, that is to say, outside the object of its creation, as defined in the law of its organization, and, therefore, beyond the powers conferred upon it by the legislature, *is not voidable only, but wholly void, and of no legal effect.* * * * A contract *ultra vires being unlawful and void*, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the Courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; *but on an implied contract of the defendant to return, or, failing to do that, to make compensation for property or money which it has no right to retain.*"

The cases cited at Circuit were numerous, but were also instances of *ultra vires* used by way of defense only.

Chapman vs. *County of Douglas*, 107 U. S. 348, makes a distinction applicable to this case, between illegality in the substance, and illegality in the specific mode of performance, of a contract. It was a bill to set aside the conveyance of land, purchased by the county for the purposes of a poor house and farm, and used thereafter for that purpose, or, in the alternative,

"In case said county of Douglas, and corporate authorities thereof, shall elect and request to be allowed to retain and hold the land described, then and in that case to compel said county and the corporate authorities thereof to pay to or for your orators, as the Court shall direct, the reasonable price and value of said land, as stated in said deed

of conveyance, with lawful interest thereon from the date of said deed to the time of the making of such payment."

The bill was demurred to, and the demurrer sustained and bill dismissed by the Circuit Court, on the ground that the contract was illegal and void. That Court held, as quoted on p. 353:

"There is no authority of law for the County Commissioners to bind the county in the manner contemplated. They cannot give a promissory note, nor can they mortgage the property of the county. Should they formally do so, their action would be a nullity."

This decree was reversed by this Court, not on the ground that a bill in Chancery lies to set aside an *ultra vires* agreement, but for the reason that, although such bill cannot be prosecuted where the contract is in substance illegal, it may where the agreement is in substance in accordance with law, but its execution exceeds the authority of the parties.

Mr. Justice MATTHEWS says (p. 355, italics mine):

"The agreement, as we have assumed, so far as it relates to the time and mode of payment, is void; but the contract for the sale itself has been executed on the part of the vendor by the delivery of the deed, and his title at law has actually passed to the county. * * * As the agreement between the parties has failed by the reason of the legal disability of the county to perform its part, according to its conditions, the right of the vendor to rescind the contract and to a restitution of his title would seem to be as clear as it would be just, unless some valid reason to the contrary can be shown. * * * *The illegality in the contract related, not to its substance, but only to a specific mode of performance, and does not bring it within that class mentioned*

by Mr. Justice BRADLEY *in Thomas* vs *City of Richmond, 12 Wall. 349. The purchase itself, as we have seen, was expressly authorized. The agreement for definite times of payment and for security alone was not authorized.*" (p. 356.)

and again, (p. 357):

"The conveyance by Chapman to the county of Douglas, passed the legal title, but upon a condition in the contract which it was impossible in law for the county to perform. There resulted, therefore, to the grantor the right to rescind the agreement upon which the deed was made, and thus to convert the county into a trustee, by construction of law, of the title for his benefit, according to the often repeated rule, as stated by Hill on Trustees, 144. * * * *"

In the pending case the illegality, if any, is of the very substance and essence of the contract. The case of *Thomas* vs. *City of Richmond*, referred to by Mr. Justice MATTHEWS in the passage just quoted, from which he distinguishes *Chapman* vs. *County of Douglas*, held (*syllabus*) that:

"Where the issue of bills as a currency (except by banking institutions) is prohibited, a municipal corporation has no power, without express authority, to issue such bills; and if it does issue them, the holder thereof cannot recover the amount, either in an action on the bills themselves, or for money had and received."

Mr. Justice BRADLEY, who reported the opinion of the Court, says of Lord MANSFIELD's opinion in *Smith* vs. *Bromley*, 2 Douglass, 696, n., that that learned Judge laid down the doctrine—

"If the act be in itself immoral, or a violation of the general laws of public policy, both parties are

in *pari delicto*, but where the law violated is calculated for the protection of the subject against oppression, extortion and deceit, and the defendant tskes advantage of the plaintiff's condition or situation, then the plaintiff shall recover."

Again in *Hitchcock* vs. *Galveston*, 96 U. S. 341, the same distinction was made, although the decision was by a divided Court, Mr. Justice STRONG writing the opinion (BRADLEY, MILLER and FIELD, *JJ.*, dissenting)

It was held that where a city counsel is vested with power to cause sidewalks to be constructed, a contract for doing the work, (*syllabus.*)

"Is not rendered wholly inoperative because it provides that the work done under it shall be paid for in bonds of the corporation, the issue whereof was not authorized by law. The contract, so far as it is in other respects lawful, remains in force, and for the breach thereof the corporation is liable.

The contract in question construed, and the proviso therein, in reference to the consent of the owners of the property fronting or abutting on the pavements to be laid, held to have reference to the materials to be used in constructing them, and not to the execution of the work itself."

The dissenting Judges held that the city of Galveston was not liable for the reason, as stated by Mr. Justice BRADLEY,

"That the proviso requiring the assent of the property holders related to the entire work around each block and not merely to the kind of pavement to be used; and that the contractors had no authority to do any work on any particular block without such previous asent" (p. 353).

The very point at issue, therefore, was whether the contract, as in the case of *Chapman* vs. *County*

of Douglas, was in substance and essence unlawful, or only in that portion which related to the methods of making payment and of doing the work. The former was held by the three dissenting Judges, the latter by the majority. The distinction for which I contend was, therefore, emphasized both by the assent of the majority and the dissent of the minority.

To the same effect is *Louisiana* vs. *Wood*, 102 U. S. 294.

If appellant's contention prevail, there must be a change in the elementary works on Equity Jurisprudence. Mistake (of fact), accident and surprise, as grounds for the reformation and rescission of contracts will necessarily be enlarged by "*ultra vires.*" My learned adversaries will be entitled to all the credit of this reform (if it be such) in the law of equity.

IV.

The contract between the parties is not ultra vires, but valid.

Upon this branch of the case, the objections will be considered *seriatim*:

FIRST.—*As to its character when tested by the laws of Illinois:—it was settled by the decision in Archer* vs. *Terre Haute and Indianapolis R. R. Co. 102 Ill. 493, that the contract between these parties is valid.* It was at Circuit assumed by my learned adversaries, that this agreement (fully copied in the amended bill, pp. 44–45, fols. 82–85), is in the nature of a lease.

No doubt it is so called, but in law and in fact it is not a lease. I shall hereafter discuss this case as if it were such, but for the present let us consider what in substance and in fact the arrangement was.

Calling it a lease did not make it such.

Murch vs. *Wright*, 46 Ill. 487.
Hervey vs. *R. I. Locomotive Works*, 93 U. S. 664.

This is an Illinois case. It arose and was prosecuted in that State. The plaintiff is a corporation of that State; it acted under the laws of that State; everything relating to the case derives its force and lawful authority from the laws of Illinois, unless it be treated as an exception to this statement, that the defendant company is a corporation of Indiana. The importance of this consideration is shown by the distinction made by Mr. Justice MILLER in the case of the *Pennsylvania Company* vs. *The St. Louis, Alton and Terre Haute Railroad Co.* at pages 313-314 of 118 U. S. It was contended in that case that in *Railroad* vs. *Vance*, 96 U. S. 450, this Court had decided that the contract claimed to be invalid and void, was binding on the Indianapolis and St. Louis Company, the lessee, on the ground that the latter company was made a corporation of Illinois by the act of that State of March 11, 1869, and was using that part of the St. Louis, Alton and Terre Haute Company's (lessor's) railroad lying within the State of Illinois under that contract. Mr. Justice MILLER says (italics mine):

"In reference to its liability to pay the taxes on that part of the plaintiff's road, it was held to be an Illinois corporation, and bound under the Illi-

nois statute by the contract of lease now under consideration.

But we have just shown that the Indianapolis and St. Louis Company was an Indiana corporation when this contract of lease was made, which was two years before it became an Illinois corporation by the act of 1869. The present suit is against it as an Indiana corporation, otherwise it could not be maintained. The validity of the contract depends on its power as an Indiana corporation to make it at the time it was made. It had none then, and no act of the Indiana Legislature has ratified it since. That suit was founded on an Illinois contract between Illinois corporations to collect Illinois revenue, and was in no sense governed by Indiana law, but by the law of Illinois.

As regards this lease in a suit against the Indiana corporation, organized under its laws by the name of the Indianapolis and St. Louis Railroad Company, *in the Circuit Court of the United States for that District*, we must hold it to be void for want of power in the defendant company to make it."

If I understand this passage correctly, Mr. Justice MILLER does not attempt to qualify, much less to overrule the decision made in the case of *Railroad* vs. *Vance*.

The distinction he makes relates to the power of of this Court and of the Circuit Court, in pronouncing upon the contract, as affected by the State in which the litigation was conducted, and the laws of which controlled it. If the cause had been tried in Illinois, and had involved Illinois law alone, the result would have been that the lease held void in 118 U. S. would have been upheld. That was the fact in *Railroad* vs. *Vance*, but *Penn. Co.* vs. *St. L. A. & T. H. R. R. Co.* being a cause tried in Indiana, involving the validity of the contract under Indiana law, the opposite result followed.

To apply this proposition to the present case is

easy. This is an Illinois lawsuit, tried and to be determined according to the law of Illinois, relating to the rights and liabilities of companies in Illinois, and having nothing to do with Indiana law: the only connection with Indiana law being the accidental fact that the corporate birth or being of the defendant company is attributable to Indiana statutes.

This being so, it follows that the decision of the Supreme Court of Illinois, expounding and upholding this contract, rendered in the case of *Archer* vs. *The Terre Haute and Indianapolis R. R. Co.* 102 Ill. 493, is paramount authority. In this case, the counsel for the railroad company, (appellee in the present case,) claimed that the title to the equipment owned by the Vandalia Company at the time of the original arrangement, passed to the T. H. and I. Company as lessee, and that therefore this equipmeet was not liable to the tax on the capital stock of the Vandalia Company imposed by the State of Illinois, inasmuch as the equipment being certain to wear out before the end of the term of nine hundred and ninety-nine years provided by the lease, there could, by reason of its physical nature and want of durability, be no remaining or reversionary interest in the lessor company. But the Court held that the interest of the T. H. and I. Company was not in the nature of a leasehold; that the objection then stated, and now renewed, to its validity as a lease, namely, that the Illinois stockholders had not assented in writing, and to which in that case no answer was attempted, forbade the support of the contract as a lease, but nevertheless that it was a valid contract between the parties, and as such it was sustained. It was held that only the use of the equipment passed to the T. H. and I. Company; that the title remained with the Vandalia Company, and that the equip-

ment was therefore liable to the tax on the capital stock of the Vandalia Company imposed by the act then in dispute.

In the *Archer* case the Court did not consider the Illinois act of February 12, 1855, (as to which more hereafter). They treated the act of 1865 as applicable, (without observing that it had been repealed), and the contract as therefore invalid if it were a lease; but they deny that it was a lease. They supported it as a valid contract by the 13th Section of the act of 1867, amendatory of the Vandalia Company's charter, and, after examining the contract with critical reference to the authority under which it had been made, conclude (503), thus:

"It follows, then, it was simply a contract for connecting the railroads of the respective companies, so as to secure a continuous line between distant terminal points. Both companies signing the agreement had full authority from the States creating such corporations to make such an agreement, and placing that construction upon it, the contract is valid, otherwise it would be void, because *ultra vires*."

In the next place, there is nothing in the contract between the parties which has the appearance or guise of a lease. I take the interest created by a lease to be an estate for years or life in the lessee carved out of the fee, the reversion remaining in the lessor. In this case, there are no words of demise, no language attempting to create an estate, no carving out of any estate, no reservation of any reversion, no payment of rent. What is granted is the use of the property and franchises of the Vandalia Company, it remaining in law and in fact seized of the property during the whole time, the relation being rather that of agency, analogous to bailment, than of lease.

There is no demise, or words of demise, nor any provision for forfeiture and re-entry in case of non-payment of rent or non-performance of the provisions of the contract. No right is reserved to reclaim or sue for possession in the event of non-performance;—no conditions are inserted in the lease; the only right reserved is by implication, viz.: in equity to compel performance, or at law to sue for non-performance. There could be no forfeiture for non-payment of rent, for there is no provision for the payment of rent. In the original contract there was that which might have been (perhaps plausibly) argued to have been the reservation of rent, namely, the obligation to account for thirty-five per cent. of the gross receipts to the Vandalia Company, but by the amendment made January 12, 1869, before the completion of the Vandalia road (fols. 85, 160), it was provided that the amount to be allowed to the T. H. and I. Company should be seventy per cent. "for operating the said road," with this addition, however,

"But that if the working and maintenance expenses of said railroad should be less than seventy per cent. of the gross receipts aforesaid, then all of such excess shall be paid over to the St. Louis, Vandalia and Terre Haute Railroad Company."

In other words, the contract between the parties has, since the 12th day of January, 1869, in law, in fact and in practice, been that the T. H and I. Company should be possessed of the property and franchises of the Vandalia road and should perform its public and private duties without any compensation, (except as a feeder,) the entire profit of the operation of the road under the contract being payable to the Vandalia Company. How different this from the instrument of lease executed between the St.

Louis, Alton and Terre Haute and the Indianapolis and St. Louis Companies, with which it is sought to compare this contract.

But whether your Honors think this attempt to distinguish between these instruments successful or unsuccessful, certain it is that the opinion in the *Archer* case has established a rule binding on this Court, for it has decided that the contract between the parties now before the Court is valid and is not a lease. This I claim, not by way of estoppel, for the Vandalia Company was not party to that case, but, as settled by paramount authority, by which this and all other Federal Courts are bound, it being a principle established by repeated decisions of this Court, that, in a case of this nature, decisions of the State Courts will be followed whether approved by the Federal Courts or not, even in many cases in which this Court itself entertains, and has expressed, a different view.

Suydam vs. *Williamson*, 24 How. 427.

Lessee of Smith vs. *McCann*, 24 How. 404.

McGoon vs. *Scales*, 9 Wall. 31.

Erie Railway Company vs. *Pennsylvania*, 21 Wall. 492–497.

Secombe vs. *Milwaukee and St. Paul Railway Company*, 23 Wallace, 108,

Burgess vs. *Seligman*, 107 U. S. 33, 34, and cases cited.

Norton vs. *Shelby County*, 118 U. S. 425.

Meriwether vs. *Muhlenburg County Court*, 120 U. S. 357.

That the *Archer* case is necessarily conclusive of

this controversy follows from the fact that it established a rule of property. It settled finally and conclusively, by the decision of the highest Court in the State of Illinois, the exact property relation existing between the parties to this action growing out of the contracts now under consideration. If it be true, as held in *Kent* vs. *The Quicksilver Mining Company*, 78 N. Y. 159, that four years' dealings without dispute by the stockholders of a company, which had no right in law to create preferred stock, bar the company and the common stockholders from disputing the validity of preferred stock actually issued;—if it be true, as held in *Zabriskie* vs. *C. C. & C. Railway Company*, (23 How. 381), that the unchallenged action of a corporation for a period of less than two years, under a statute, which required the formal consent of stockholders to be given in a particular manner, as condition precedent to the exercise of authority, whereas in point of fact no such consent was given, is sufficient to estop such stockholders;—if it be true, as held in *Bradley* vs. *Ballard*, 55 Ill. 413, 419, and in *City of East St. Louis* vs. *East St. Louis Gas Light and Coke Company*, 98 Ills. 415, that an executed illegal contract estops a corporation which has received the benefits from disputing its validity; then, *á fortiori*, the contract in question is beyond present dispute, by the addition of the approval of the highest Court of the State, given in the most formal manner to acts of the same character as those, which, in other cases, even without such sanction, were held to create final estoppels.

Even the reversal of the *Archer* case would not, under the doctrine announced in *Gelpcke* vs. *The City of Dubuque*, 1 Wall. 175;—*Butz* vs. *The City of Muscatine*, 8 Wall. 575;—and *Olcott* vs. *Supervisors*, 16 Wall. 678;—be held to affect rights of prop-

erty, which had vested in the faith reposed in that decision. But there is nothing to show that the Supreme Court of Illinois is not as fully persuaded of the soundness of the doctrine announced in the *Archer* case, as it was in 1882, when the case was decided. It was cited, as if approved, as recently as 1887, in *Fietsam* vs. *Hay*, 122 Ill. 293.

It was contended at Circuit that the opinion in the *Archer* case was, as far as relates to the question now under discussion, pure *obiter dictum*. This contention, if renewed, will be in continued forgetfulness of the fact that the decision was placed upon two grounds. The latter part of the opinion begins on page 504 of 102 Illinois, with these words :

"There is another reason having great force why this bill should be dismissed. It is because equity will not give a party relief against that which it is his duty to do."

This and the succeeding passages embrace nearly two pages of the decision, and are to the effect that the contract being valid required—the T. H. & I. Company to advance the sums of money necessary to pay the taxes which were the subject of contention in the case. Therefore, said the Supreme Court of Illinois, the Terre Haute and Indianapolis Railroad Company must fail, because, having entered into a valid contract to provide the means to pay these taxes, it could not object that they were illegally charged on its property. This part of the decision in the Archer case cannot be got rid of by saying it was unnecessary ;—it was no more unnecessary than the rest of the decision. The Court gave two independent and unanswerable reasons why the plaintiff, the T. H. & I. Co., should not have the relief sought : *First*, that the title to the

equipment remained in the Vandalia Company notwithstanding the contract; *Secondly*, that the contract required the T. H. & I. Company to provide the money to pay the taxes in question. The second of these reasons is as complete and independent as the first, and necessarily involves the conclusion that the contract is valid.

SECONDLY.—Supposing the decision in the *Archer* case not to be a controlling adjudication of the character of the contract, and that this Court is persuaded that this is the case of a lease of a railroad situated wholly within the State of Illinois, made by an Illinois corporation to a railroad company organized under and deriving its powers from the Legislature of Indiana, I reply that, whatever consequences may, in Indiana, flow from such conclusion, they cannot impair the validity of the contract in Illinois, where this cause was brought, and in which it is still, in contemplation of law, supposed to be pending. This leads me to consider:

(1.) *The authority to lease given by the statutes of Illinois.* My learned adversaries rely on the Illinois Act of February 16, 1865, (p. 91, fol. 161), which required:—

"the written consent of all the stockholders of said roads residing in the State of Illinois to precede a consolidation of an Illinois railroad with any railroad out of the State or the lease of an Illinois railroad to any company out of the State,"

and further provided that:—

"Any contract for such consolidation or lease which may be made without having first obtained such written consent signed by the resident stockholders in Illinois shall be null and void."

To the citation of this statute I reply, *first*, that this act was personal to the stockholders resident in Illinois, and could not have been taken advantage of by third persons. This is, it seems to us, the necessary result of the decision of the Supreme Court of Illinois in *Thomas* vs. *Citizens Horse Railway Co.* 104 Ill. 462, decided several months later than the *Archer* case.

In the *second* place, the objection could not be made now by stockholders resident in Illinois. After nineteen years acquiescence in the operation of the contract, they would come too late.

In the *third* place, the act of February 16, 1865 was repealed by the general repealing act of March 31, 1874, which took effect July 1, 1874, (2 Starr & Curtis' Annotated Stat. 2354, par. 527), whereas the contract was treated as in full force, and acted upon by the parties continuously after the repeal of the act of 1865. This action of the parties is a continuing re-execution of the so-called lease.

Goodin vs. *Evans*, 18 O. St. 150.
Illinois River R. R. Co. vs. *Zimmer*, 20 Ill. 654.
Zabriskie vs. *R. R. Co.*, 23 How. 381.

In the *fourth* place the repealing act of 1874 did not embrace the act of February 12, 1855, so that ever since the date of the repeal of the act of February 16, 1865, this act of 1855 (2 Starr & Curtis Annotated Statutes, 1921, Par. 43), has been in unbroken force as follows :

"AN ACT to enable railroad companies to enter into operative contracts and to borrow money.

Section 1.—Be it enacted by the People of the State of Illinois, represented in the General

Assembly, that all railroad companies incorporated or organized under, or which may be incorporated or organized under the authority of the laws of this State, shall have power to make such contracts and arrangements with each other, and with railroad corporations of other States, for leasing or running their roads or any part thereof; and also to contract for and hold, in fee simple, or otherwise, lands or buildings in this or other States for depot purposes; and also to purchase and hold such personal property as shall be necessary and convenient for carrying into effect the object of this act.

Section 2.—All railroad companies incorporated or organized, or which may be incorporated or organized as aforesaid, shall have the right of connecting with each other, and with the railroads of other States, on such terms as shall be mutually agreed upon by the companies interested in such connection."

The authorities just cited establish that action in accordance with this statute amounts to an acceptance of its provisions, and is equivalent to the formal re-execution of the contract.

Thirteen years continued working of the Vandalia road, under the contracts of 1868 and 1869, between 1874 and the beginning of this suit, certainly constituted an acceptance of the act of 1855. Such working and operation are legally referable only to the act of 1855. It is in law as if the two parties had met after the repeal of the act of 1865, and having discovered the omission to approve in writing by the resident stockholders, had said each to the other,

"the statute requiring this approval has been repealed. But there is another statute under which the lease may be made without this preliminary. It cannot be necessary for us formally to re-execute; let us continue to act, for this will be equivalent to re-execution, and to re-execution under the act of 1855."

It was argued at Circuit that the Illinois Act of 1855 only authorizes the leasing of an Indiana railroad by an Illinois company, and not of an Illinois railroad by an Indiana company. This question was considered and disposed of by this Court in the case of the *Penn. Co.* vs. *St. L. A. & T. H. R. R. Co.*, 118 U. S. 290. At page 309, Mr. Justice MILLER says:

"Though it might be said that this act only authorizes Illinois railroad companies to become lessees, we think it must be conceded that this enactment authorized the St. Louis, Alton and Terre Haute Railroad Company, which we have already said was exclusively an Illinois corporation, to enter into the lease or operating contract found in the record."

This passage of Mr. Justice MILLER's opinion was criticised in the argument at Circuit as not fully meeting the point. It seems to me rather to brush it aside as, if not frivolous, at least having very little claim to respect. If the word "said" used by Mr. Justice MILLER be changed to "claim," as was evidently his meaning, the strength of his statement will at once become apparent. He holds, in effect, that although it might be claimed ("said") that this statute only authorizes railroad companies to become lessees, the claim is so unfounded, that its denial ought to be conceded, and is at once allowed by the Court. That this must be so, is manifest from the fact that the act is applicable to both domestic and foreign corporations. The provision is that all Illinois Railroad companies,—

"Shall have power to make such contracts and arrangements with each other and with railroad corporations of other states for leasing or running their roads * * * as shall be necessary and convenient."

If this give power to an Illinois corporation to take a lease, it bestows the same upon an Indiana corporation, for the same words describe the authority conferred upon the corporations of both States. Authority to give implies power to take a lease. If authority be conferred by this act upon a corporation of Illinois, to lease its road to another corporation of Illinois, it is, in like manner and by the same words, given to a corporation of Illinois, to lease its road to a railroad company of Indiana, and to both these classes of corporations to take such lease.

In *Matter of Prospect Park and Coney Island Railroad Company*, 67 N. Y. 371, Judge FOLGER, for the unanimous Court of Appeals of New York, held (p. 377), that—

"The point of the appellants, that no power to consolidate is given to the other of those corporations, is without effect. Power is given by statute to one corporation to form a consolidation with *any other*. It cannot form a consolidation unless it finds another with which to unite, and which is capable of union with it; hence, whatever other company it selects for a union and finds willing to join it, that other company, though not named in the statute, gets power from the statute to unite with that company which the statute names."

In the *fifth* place, in addition to the powers conferred by the Illinois act of February 12, 1855, we find the following in the charter of the complainant company, being Section 13 of the act of February 8, 1867 (Record. p. 61, folio 112),

"Said company shall have power to consolidate and connect its railroad with any other continuous line of railroad now constructed, or which may be hereafter constructed, either in this State or in the

State of Indiana, upon such terms as may be agreed upon between the companies so connecting or uniting, and for that purpose full power is hereby given to said company to make and execute such contracts with any other company as will secure the object of said consolidation or connection."

Section 17 (Record, p. 62, fol. 113), also provides that—

"All the corporate powers of said company shall be vested in and exercised by the board of directors."

And Section 21 (Record, p. 63, fol. 115), is as follows:

"The corporate rights, privileges and franchises of said company as granted are hereby declared to be in full force and effect, and shall be liberally construed for all the purposes sought to be obtained."

Of these powers more hereafter.

It was contended in the Circuit Court by the learned adversaries that the rule "*in pari delicto potior est conditio possidentis aut defendentis*" does not apply to the present case, because it has no application where the object of a suit is to vindicate the public policy of the State or country. But this contention must fail, because it is already manifest that there is no such public policy in Illinois as to that which must be shown to justify the application of the argument.

In Story on Equity Jurisprudence, section 298, the discussion of this subject is closed with the following sentence:

"And so accordingly the modern doctrine is established. Relief is not granted where both parties are truly in *pari delicto* unless in cases where public policy would thereby be promoted."

Again I take the liberty of reminding your Honors that this is an Illinois and not an Indiana suit. We are not concerned in this case with the public policy of Indiana. The public policy of Illinois permits the leasing of railroads in Illinois to corporations of other States. This is proved by the act of 1855. It was also proved by the repealed act of 1865.

It may or may not be that the public policy of Illinois was changed on the 30th of June, 1885, by reason of the act approved on that day, (3 Starr & Curtis' Annotated Stat. 447). It was claimed at Circuit that, if the public policy of Illinois had been before that time as I claim, it nevertheless was changed on June 30, 1885, by reason of the passage of the act of Illinois of that date.

If this were true, it would simply show that seventeen years after the contract in question was made, and fifteen years after it had been in uninterrupted execution by the consent of the parties without objection by any one, State or individual, the State of Illinois reversed a public policy which had been established by law thirty years before. But it is not true. The statute in question does not establish what is claimed. It is simply a proviso to an act, intended, not to establish a general State policy,—but to limit the effect of the statute itself, which statute does not purport to repeal the act of 1855.

(2.) *Let me now direct attention to the powers conferred by the statutes of Indiana.* This is supposed to be my adversary's stronghold.

(A.) It will not be contended that the laws

of Indiana *forbid* the lease of an Illinois railroad to an Indiana corporation. As long as the Indiana corporation fulfills and performs its public duties under its charter, and its stockholders are satisfied, there seems to be no reason why the State of Indiana, much less any third person, should complain. The State has not in fact complained.

P. C. and St. L. Railway Co. v. *C. C. and I. C. Railroad Company*, 8 Biss. 456, 478.

If this case stood alone, the conclusion would be justified that the lease between these parties was specifically authorized by the laws of the State of Indiana, but supposing its authority to have been shaken or overthrown by the more recent decisions of this Court, it, at least, is specific authority to the proposition that there is no *prohibitory* provision in the Indiana Laws. This being so, a long line of decisions proves that where such action by a corporation is not prohibited by the State of its domicile, it may be permitted to enter into any contract permitted by the law or comity of another State in which it may do business.

Bank of Augusta v. *Earle*, 13 Peters, 519, first established this proposition.

It has been repeated more recently in the case of *Tombigbee Railroad Co.* v. *Kneeland*, 4 How. 16.

Pensacola Telegraph Co. v. *Western Union Telegraph Co.*, 96, U. S. 1.

Cowell v. *Springs Company*, 100 U. S. 55.

Christian Union v. *Yount*, 101 U. S. 352, 357.

See also *B. & P. R. R. Corporation* v. *N. Y. & N. E. R. R. Co.* 13 R. I. 261, 2, 3.

Ellsworth v. *St. Louis, Alton & Terre Haute R. R. Co.* 98 N. Y. 553.

Penn. Co. vs. *St. Louis, Alton & Terre Haute R. R. Co.* 118 U. S. 290, does not interfere with this proposition. This will, if possible, be made more clear when the facts of that case are considered, but the passage already quoted from Mr. Justice MILLER's opinion distinguished that case from *Railroad* vs. *Vance*, on the ground, among others, that the former was tried in Indiana, and controlled by the laws of that State, while *Railroad* vs. *Vance* was tried in Illinois and governed by the laws of that State.

How can the opposite conclusion be reached without reversing the line of cases decided by this Court, which begin with *Bank of Augusta* vs. *Earle?* It was argued with great force by one of my learned adversaries at Circuit, (I quote from page 101 of the brief there filed):

"That the law is clear and plain as established by unnumbered decisions that all powers not granted to corporations are prohibited."

The learned author of this passage forgot that at least an *implied* prohibition has no extra-territorial force. If his theory of the extent of the application of the doctrine of implied prohibition were sound, no corporation could do any business of any kind outside the State of its creation unless expressly authorized by such State.

Nor even then, for the reason that the State which created the corporation having no power of extra-territorial legislation cannot confer power upon artificial beings of its creation to do business beyond its limits. Such power cannot be effectually granted without the permission of the State within which it is sought to be exercised. On the theory I am now combating, there is in the charter of every corporation, or at

least in the charter of every corporation not expressly authorized to do business out of the State of its creation and domicile, an implied prohibition that the corporation shall do no business outside such State.

Even an express prohibition cannot have effect in another State. It is quite true that the State creating the corporation may annul its charter in case of the violation of such inhibition, but this is the extent of the penalty. If the contract be permitted by the State in which it is made, it is well enough at least when tested in the Courts of that State, whatever might be the result of a trial in *quo warranto* or *scire facias* in the Courts of the State imposing the restriction. This is the effect of the unanimous decision of the Court of Appeals of New York, in *Ellsworth* vs. *St. Louis, Alton and Terre Haute R. R. Co.* 98 N. Y. 553. It was there contended that the issue of three hundred bonds of one thousand dollars each by the defendant company, was not only *ultra vires*, but—

"illegal, the sale of them at less than par having been prohibited by the charter."

To this Judge RAPALLO answers, (p. 559) :—

"On this branch of the case, it is sufficient to say that the contract was, in all respects, a New York contract. The bonds were issued and sold in the city of New York, and the interest and principal are both payable in that city. There is nothing in the laws of New York which renders the contract illegal, and even if the charter of the defendant (which was granted under the statutes of the States of Illinois and Indiana) should be so construed as to contain prohibitions which would have rendered the contract illegal in those States, if made there, they do not have that effect in this State. They have no effect here, except as restric-

tions upon the power of the corporation or its officers."

For these reasons the action of the General Term, granting a new trial, after verdict for the defendant below, was affirmed—

"and judgment absolute entered against the defendant on its stipulation."

It must never be forgotten that the laws of Indiana do not prevail and have no effect within the State of Illinois, nor the laws of Illinois in Indiana. The laws of one State are enforced in another only when the case is within the full faith and credit rule of the Constitution of the United States, or for the reason of comity.

In *Muller* vs. *Dows*, 94 U. S. 444, Mr. Justice STRONG, speaking of a consolidated corporation, says (p. 447, italics mine):

"The Missouri statutes contain similiar provisions, and with these laws in force the consolidation of the Chicago and Southwestern Railways was effected. The two companies became one, but, in the State of Iowa, that one was an Iowa corporation, existing under the laws of that State alone. *The laws of Missouri had no operation in Iowa.*"

See also *Railway* vs. *Whitton*, 13 Wall. 270, at p. 283, the Court say:

"The defendant is a corporation and as such a citizen of Wisconsin by the laws of that State. It is not there a corporation or citizen of any other State. Being there sued, it can only be brought into that Court as a citizen of that State, whatever its status or citizenship may be elsewhere."

See also *Memphis & Charleston Railroad Co.* vs. *Alabama*, 107 U. S. 581, 585.

What difficulty is there in the way of the State of Illinois conferring on natural persons, resident of Indiana, corporate or other powers, to be exercised in Illinois only, which by the laws of Indiana they may be debarred or forbidden from exercising in Indiana? Not the least. Nor is there any legal objection to the State of Illinois conferring powers on a citizen or even on a corporation of Indiana, which, or the like of which, he or it has no power to exercise by the laws of Indiana. To deny this proposition is to restrict the State sovereignty of Illinois beyond the limitations imposed by either the Constitution of the United States or of the State of Illinois. This is at least true as long as the State of Indiana acquiesces by non-action.

There is no mystery in corporate action—it is only a mode or form of individual action. Nobody ever saw, smelt, felt, tasted or heard a corporation. It is a legal fiction—relation, *status*—occupied, worked and managed by natural persons only.

A little discrimination will not be inapplicable here, viz., between the effect of comity and of positive law within a State. When a corporation of one State comes into another to do business, without any specific legislation in aid of its enterprise adopted by the legislature of the second State, its rights within that State are determined by the rule of comity. This comity permits it to exercise within such State those charter powers only which have been conferred upon it by the State of its domicile. This is the class of cases referred to by Chief Justice WAITE, in *Canada Southern Railway Co.* vs *Gebhard*, 109 U. S. 537.

In cases of this kind, Courts look for definition of the corporate powers and restrictions, to the statutes of the State of domicile. Comity is not the result of legislative act, but of judicial decision.

But when the corporation of one State receives a specific grant of power by the affirmative legislation of another State, this legislation, if not inconsistent with the Constitution of the United States of America and of the second State, is the only grant, definition or limitation of the powers of the corporation at least within the State granting it, and is fixed by the language of the legislature irrespective of the original charter granted in the other State. In cases of this kind, the operation of comity is excluded by positive statute. It will not be pretended, I presume, that the Legislature of Illinois is forbidden, either by the Constitution of the United States or of Illinois, from permitting the corporation of another State or country to do any business such Legislature may see fit within the boundary lines of the State of Illinois. The Legislature may exclude or admit, may permit or refuse, in such cases. The argument to the contrary seems to me to be in defiance of both principle and authority. The State of Illinois has a right to create artificial corporations, and to endow them with powers to be exercised within Illinois. If a corporation of Indiana has acquired the function of artificial being under the laws of that State, what forbids the Legislature of Illinois from conferring upon such corporation any powers it may deem best, to be exercised only within the State of Illinois? What could Indiana do to prevent corporations of its creation from accepting and exercising such powers? Only this, viz.: forfeit their charters and thus deprive the individuals controlling them of the franchise of artificial being. It can thus take away what *it* has given, not what Illinois has given.

In *Day* vs. *Ogdensburgh and Lake Champlain R. R. Co.* 107 N. Y. 129, Judge DANFORTH, at page 140, expresses the unanimous opinion of the

Court of Appeals of New York upon this subject. It had been argued that the arrangement, out of which the controversy arose, was beyond the power of the Ogdensburgh & Lake Champlain Company to make. Judge DANFORTH says that the Vermont Railroad Company had express power,—

"to lease its road. It had, therefore, contracting capacity and was a good party to deal with."

The Ogdensburgh & Lake Champlain Railroad had the power conferred by the laws of New York, of 1839, Chap. 218,—

"authorizing railroad companies to contract with each other,

"Under this act," continues Judge DANFORTH, (italics mine),

"it might lawfully agree with any other railroad corporation for the use of its road in any manner not inconsistent with the provisions of the charter of the corporation whose railroad is to be used under such contract. The contract in question is not affected by limitation expressed in the act, and *unless we are to imply into it another restriction, and say that its operation must be confined to contracts with roads operating in and under the laws of this State*, the lease must be held valid between the parties. We see no reason for such restriction, nor any principle of public law which requires it. We are not at liberty to create it. It would be legislation, not construction. A corporation given capacity to contract *may exercise that capacity with any party in or outside the limits of the State, unless the law making power of that other State forbids. (Bank of Augusta* vs. *Earle, 13 Peters, 519). Our own statutes and the interpretation given to them by the Courts are to that effect. (Woodruff* vs. *Erie R. Co. 93 N. Y. 609; in re N. Y. L. & W. R. R. Co. 99 id. 12; in re Peter*

Townsend, 39 id. 171; in re Staten Island Rapid Transit Co. 103 id. 251). In this case there is no such prohibition."

(B.) The State of Indiana, by act of February 23, 1853, (reported in Revised Statutes under sections numbers 3971, 3972 and 3973), expressly authorized this contract. The following are the sections in question:

"*Sec. 3971:* Any railroad company heretofore organized under the general or special laws of this State, shall have the power to intersect, join and unite its railroad with any other railroad constructed or in progress of construction in this State or any adjoining State, at such point on the State line or at any other point as may be mutually agreed upon by said companies; and such railroad companies are authorized to merge and consolidate the stock of the respective companies, making one joint stock company of the two railroads thus connected upon such terms as may be by them mutually agreed upon in accordance with the laws of the adjoining State, with whose road or roads connections are thus formed; provided, their charters authorize said railroads to go to the State line or to such point of intersection."

"*Sec. 3972:* Any railroad company heretofore organized, or which may hereafter be organized under the general or special laws of this State for the purpose of constructing a railroad from any point within this State to the boundary line thereof is hereby empowered to extend said railroad into or through any other State or States, under such regulations as may be prescribed by the laws of such State or States into or through which said road may be so extended; and the rights and privileges of said company over said extension, in the construction and use of said railroad for the benefit of such company, and in controlling and applying the assets of such company, shall be the same as if its railroad had been constructed wholly within this State.

Sec. 3973: Any Railroad Company heretofore organized or which may hereafter be organized under the general or special laws of this State, and which may have constructed or commenced the construction of its railroad, so as to meet and connect with any other railroad in an adjoining State at the boundary line of this State, shall have the power to make such contracts and agreements with any such road constructed in an adjoining State, for the transportation of freight and passengers, or for the use of its said road, as to the board of directors may seem proper."

That these sections are comprehensive enough for the purpose in question can hardly be successfully asserted without reversing the decisions in the case of *Branch* vs. *Jesup*, 106 U. S. 468, and *Hill* vs. *Nisbet*, 100 Ind. 341.

In *Branch* vs. *Jesup*, it was held that the power to consolidate includes the lesser power to sell or buy another road.

Mr. Justice BRADLEY (page 478), says: (italics mine):

"But this company had, by its charter, express power to incorporate its stock with the stock of any other company. This power has an enlarging effect upon the ordinary power to sell and dispose of property belonging to the company. Generally the power to sell and dispose has reference only to transactions in the ordinary course of business incident to a railroad company, and does not extend to the sale of the railroad itself, or of the franchises connected therewith. * * * But where, as in this case, power is given to incorporate the capital stock with the stock of any other company, a very large addition is made to the ordinary powers granted to a company. In this country the creation and exercise of such a power is well understood. It contemplates not only the possible transfer of the railroad and its franchises to another company, but even the extinguishment of the corporation

itself, and its absorption into a different organization *The greater power of alienating or extinguishing all its franchises, including its own being and existence, contains the lesser power of alienating its road and the franchises incident thereto and necessary to its operation.*"

It was further held that the power conferred upon the consolidated company to construct a railroad included power to purchase and pay for the same by the issue of its own stock (page 484).

In *Hill* vs. *Nisbet*, it was held that,

"Under the statutes of this State, railroad corporations may acquire by purchase, or consolidate with, other connecting or intersecting lines ; and the organization of a railroad corporation, with the view of ultimately consolidating, upon equitable terms, and in accordance with the provisions of the statute, with one already existing, is not against public policy.

A railroad company having power to consolidate with connecting or intersecting lines, may, under the statute (R. S. of Ind., 1881, Section 3951), with a view to accomplishing such consolidation, and carrying out the object for which it was created, purchase the stock of such other roads."

The statute of Indiana, (originally adopted March 3, 1865, but codified as Section 3951 of the Revised Statutes,) under which these conclusions were reached, was in part quoted and its meaning elucidated in the opinion of the Supreme Court, at page 350, as follows:

"Section 3951, R. S. 1881, authorizes any railroad corporation organized under the provisions of the general railroad law, 'to acquire, by purchase or contract, the road, roadbed, real and personal property, rights and franchises of any other railroad corporation or corporations which may cross or intersect' its line ; and if in any case it should appear to be a necessary or reasonable means to

that end, no reason is perceived why it might not be accomplished by purchasing the stock, instead of purchasing the corporate property directly. In short, the purchase of stock by one railroad corporation in another will be upheld whenever it is a necessary or reasonable means to the accomplishment of an end proposed, which is within the scope of its statutory powers.

Keeping in view the averments in the complaint, from which the purpose for which the stock was purchased may be fairly inferred, and considering the broad and comprehensive powers, conferred by the statutes on railroad corporations, authorizing them to acquire real and personal property 'necessary to accomplish the objects for which the corporation is created,' and to acquire the property of, and consolidate with uncompleted connecting and intersecting lines, and we cannot say that the purchase of the stock was unauthorized. R. S. 1881, sections 3903, 3951."

Authority was thus conferred upon—

"any railroad company incorporated under the provisions of this act to * * * acquire by purchase or contract."

I suppose that this alternative grants power to acquire by deed conveying full title, or by contract for use clothing the acquiring corporation with less than the absolute ownership of the property. If this be sound, it would seem difficult to resist the conclusion that *Hill* vs. *Nisbet* involves a decision by the Supreme Court of Indiana in favor of the right of railroad corporations organized under the Act of March 3, 1865, (Rev. St., § 3951, viz.: corporations organized by purchasers at judicial sales,) to lease the railroads of others.

But this right conferred by this act is not limited to lines which connect or intersect within the State of Indiana. It extends, by its express terms, to railroad lines which connect or intersect at the State boundary line. The passage quoted from Sec. 3951, by the Supreme Court, in *Hill* vs. *Nisbet*, *ut supra*, continues as follows:

"May also contract for the use and enjoyment, in whole or in part, of any railroad or railroads lying within adjoining States."

The execution of the contract now in question is clearly, therefore, if not authorized by Rev. St. 3951, as expounded in *Hill* vs. *Nisbet*, at least within the power granted by the *first* and *second* sections of the Act of 1853, viz.: the power to consolidate and the power to extend. This power to extend, it must be observed, however, is not unqualified and unlimited. It is a power to extend,

"under such regulations as may be prescribed by the laws of such State or States into or through which said road may be so extended."

The Illinois Act of 1855 prescribed the "regulations" to which the extending company must conform. This road was extended by force of the power to lease conferred by the Illinois Act of 1855. The "regulations" are "prescribed" in it. We have, therefore, here, the case, not merely of an Indiana corporation, not forbidden by its charter to come into Illinois, and by the comity or express permission of Illinois taking the lease of an Illinois railroad, but of an Indiana corporation authorized by its charter to extend its railroad under regulations to be prescribed by Illinois, and we find the regulations prescribed by Illinois, and exact conformity thereto in the action of the corporations.

In answer to this it will be said that this Court in *Penn Co.* vs. *St. Louis, Alton and Terre Haute Railroad Co.* held that the *third* section of the Indiana Act of 1853 did not authorize an Indiana railroad company to take the lease of an Illinois road (118 U. S. 311).

The language of that section confers, upon a railroad company of Indiana meeting or connecting with another railroad in an adjoining State at the boundary line of the State—

"the power to make such contracts and agreements with any such road constructed in an adjoining State for the transportation of freight and passengers, or *for the use of its said road* as to the Board of Directors may seem proper."

It is manifest that this section contemplates two classes of—

"contracts and agreements,"

viz:

(1) "for the transportation of freight and passengers,"

and—

(2) "for the use of its said road."

As the statute employs these phrases in the alternative, it is manifest that the Legislature meant by contracts "for the use of its said road," something different from agreements "for the transportation of freight and passengers." Certainly such agreements as the Supreme Court of Illinois in the *Archer* case held that these companies did enter into are within the language—

"use of said road."

In New York like language has been held to authorize the leasing of its railroad by one company to another. Indeed the Legislature of New York

has only conferred the power to lease by the use of phraseology of this kind.

The New York act of April 23, 1839 (Chap. 218), authorizing—

"railroad companies to contract with each other,"

provides that—

"It shall be lawful hereafter for any railroad corporation to contract with any other railroad corporation for the use of their respective roads, and thereafter to use the same in such manner as may be prescribed in such contract. But nothing in this act contained shall authorize the road of any railroad corporation to be used by any other railroad corporation in a manner inconsistent with the provisions of the charter of the corporation whose railroad is to be used under such contract.

In *Woodruff* vs. *Erie R R. Co.* 93 N. Y. 609, Chief Justice RUGER, for a unanimous Court, after quoting this statute, adds (p. 616):

"This act has never been repealed, and has been held by this Court to confer power upon railroad corporations, not only to acquire, but also to transfer to other railroad corporations, by lease, the exclusive right to use and enjoy the property and privileges of the lessor in such contract. (*Fisher* vs. *N. Y. C. & H. R. R. Co.* 46 N. Y. 644; *People* vs. *A. & Vt. R. R. Co.* 77 *id.* 232; *T. & B. R. R. Co.* vs. *B. H. T. & W. Ry. Co.* 86 *id.* 107."

To the same effect are—

Matter of N. Y. Lack. & West Ry. Co. 99 N. Y. 12, 21.

Day vs. *Ogdensburg & Lake Cham. R. R. Co.* 107 N. Y. 129, 140.

Beveridge vs. *N. Y. El. R. R. Co.* 112 N. Y. 1, 21.

The precise point decided by this Court, in the case of the St. Louis, Alton & Terre Haute Company's lease, was that the *third* section of the Indiana Act of 1853 (Section 3973 of the Revised Statutes of Indiana), did not authorize the lease of the St. Louis, Alton & Terre Haute Railroad, extending from Terre Haute *via* Alton to East St. Louis. Mr. Justice MILLER, on page 312, after quoting this *third* section, says:

"We cannot see in this provision any authority to make contracts beyond those which relate to forwarding by one company the passengers and freight of another, on terms to be agreed on, and possibly for the use of the road of one company in running the cars of the other over it to its destination without breaking bulk."

Two important observations applicable to the present case are to be made upon this language. In the *first* place, *Branch* vs. *Jesup* was not referred to by Mr. Justice MILLER. It was not necessary that it should be. The lease to the I. & St. L. Co. was not, upon the original hearing, justified by reference to the *first* or second sections of the act of 1853, and therefore nothing in the case as then presented to the Court, called for the application of *Branch* vs. *Jesup* to those sections. In the *second* place, however, and perhaps more important, as discriminating that case from the present, the facts of that case required the Court to hold, if it should sustain the lease, that the laws of Indiana authorize the lease of a railroad within as well as outside of Indiana. The difference between that case and the present, in point of fact, is geographical as well as legal, viz.: the Terre Haute and Indianapolis Railroad begins at Indianapolis and ends at the boundary line of Indiana and Illinois, where the Vandalia railroad begins, which ends at East

St. Louis. Both in law and in fact the roads of the two parties to the present case meet at the boundary line between the two States. The Indianapolis & St. Louis road however began at Indianapolis and extended to Terre Haute only, several miles east of the boundary line between the States, and the St. Louis, Alton and Terre Haute Railroad began at Terre Haute, and thence ran through Indiana and Illinois to East St. Louis. Reference to the map will show that while the railroad companies engaged in the present controversy meet at the State line between Indiana and Illinois, the railroad companies whose interests were involved in the case in 118 U. S. meet at the City of Terre Haute, in Indiana, and miles to the eastward of the boundary line of the two States. In other words, there is a link or piece of railroad between Terre Haute and the boundary line of Indiana, constituting an integral portion of the St. Louis, Alton and Terre Haute Railroad, which was embraced within the lease to the I. & St. L. Co. under consideration in 118 U. S. The railroads of the two companies, parties to that controversy, did not meet at the State boundary line, but at a point within the State of Indiana, several miles to the eastward. As the transaction was single and entire, and was not only in form but in substance a lease (differing in this respect from the present case), it follows that before this Court could hold it valid, it was obliged to pass on the legal relations between the parties, not only as fixed by the laws of the State of Illinois, but by the laws of Indiana, and to sustain the power to lease an Indiana railroad made by a consolidated company of Indiana and Illinois to an Indiana corporation. It could not be pretended for a moment that the parcel of road of the lessor company lying east of the State boundary

line of Indiana and Illinois, and extending eastward to Terre Haute, was controlled by any law but that of Indiana, and it being once ascertained that that law did not authorize a railroad lease, the natural and necessary result followed, viz : that delared by Mr. Justice MILLER. Geography thus decided that case against the Indianapolis & St. Louis Company, while geography in this case favors the Terre Haute and Indianapolis Company.

I am aware that the *first* and *second* sections of the act of 1853 were claimed, by petition for rehearing, to have a bearing in favor of the validity of the lease of the St. Louis, Alton and Terre Haute Railroad, and that this Court is said to have decided otherwise at page 630 of 118 U. S.

This does not appear from the decision itself. The point of the decision upon the petition for rehearing as reported is that (p. 633).

"While on one of the main points in the case, namely : the statutory authority of the Indianapolis & St. Louis Railroad Company, under the laws of Indiana, to make the lease which was the foundation of the suit, there are some other statutes and some other decisions of the State and the State Court cited, we do not think they invalidate the ground on which the decision of this Court at the last term rested."

That ground was that the *third* section of the Act of 1853 did not authorize the lease. Mr. Justice MILLER adds that there was no "decisive or conclusive expression of opinion" by the Supreme Court of Indiana, and that this Court was therefore required to exercise its own judgment, and continues :

"We are not able to see, in the cases cited for the first time in this petition, anything which modifies

this proposition. The same may be said of the statutes specially relied on in the petition. There is, in our opinion, no authority found in them for the lease by the defendant company of the entire road, property, franchise, powers, and control of the plaintiff's road for ninety-nine years."

I cannot see how this can be used to establish the proposition that the *first* section of the Act of 1853, which authorizes consolidation, and the *second* section, which authorizes extension into another State under such regulations as might be prescribed by the laws of such State, do not authorize the contract now in question. This contract is different and the statute is different from that considered by the Court. It may be that Mr. Justice MILLER and this Court would have held that *Branch* vs. *Jesup* is not good law, but I do not believe it. The learned Justice assented to that opinion. The very recent reference to *Branch* vs. *Jessup*, by Mr. Justice GRAY, in *Central Transp. Co.* vs. *Pullman's Palace Car Co.* 11 Sup. Ct. Rep. 482, does not indicate that this Court has any doubt of the soundness of the conclusions there enunciated. It may be that Mr. Justice MILLER and his associates would have held that the power to consolidate does not include the lesser power to purchase or alienate, but the learned Justice has not so so said. It may be that Mr. Justice MILLER and this Court would have held that the power to extend into another State under such regulations as may be prescribed by the laws of such State does not include the power to take a lease as prescribed by the laws of such State ; but it has not as yet been so held.

It may be that the statutes specially relied on in the petition for rehearing, referred to by Mr. Justice MILLER in this passage of the opinion included the *first* and *second* sections of the Indiana Act of 1853.

It does not so appear, however, from the report of the case. On the contrary, of the three grounds set out in the petition for rehearing, the *second* and *third* have no relation to the present discussion, and the *first* ground does not appear to be founded on these sections, but on a reaffirmance by the counsel for the St. Louis, Alton & Terre Haute Company of the proposition passed upon by the Court adversely to their views, at the first hearing, to wit: that the I. & St. L. company,—

"a corporation of the State of Indiana, was expressly authorized by the laws of that State to make such contract or agreement with your petitioner 'for the use of its road as to the Board of Directors of said company might seem proper;' and that said contract so declared void in the opinion rendered in this case, was fairly entered into and fully ratified and approved by the Boards of Directors of each of said companies" (p. 631).

This is not a claim that the power to consolidate, or the power to extend, includes the power to take a lease, but it is the very claim made at the original hearing, namely, that the power was given by the *third* section of the Indiana Act of 1853, correctly quoted in the petition for rehearing,—

"to make such contracts aad agreements with any such road constructed in an adjoining State for the transportation of freight and passengers or for the use of its said road as to the Board of Directors may seem proper."

This Court had decided that this statutory provision did not justify a lease, but at the most,—

"the use of the road of one company in running cars of the other over it to its destination without breaking bulk," (p. 312),

and what the Court did upon rehearing was to adhere to this opinion.

I again remind your Honors of the vital difference between the two controversies. In the pending case the question is whether the lease of an Illinois railroad will be again sustained by the Courts which administer the laws of Illinois. In the case in 118 U. S. the question was whether the lease of a road in both Illinois *and Indiana* would be sustained by an Indiana Court. The difference is *toto coelo*,—between points on the opposite sides of the circumference of a whole circle,—as far apart as from zenith to nadir; and the one case is no authority in the other, except that it excludes the possibility of my making the unnecessary if not foolish claim here, if it were otherwise relevant, that the *third* section of the Indiana statute authorizes a lease or such contract as was entered into between the I. & St. L. and the St. Louis, Alton and Terre Haute Companies, the Supreme Court of Illinois having decided that such is not the nature of the arrangement between the parties to the present case, but that it is of the very kind which Mr. Justice MILLER held is authorized by the said *third* section of the Indiana statute.

In reply to the foregoing, it will be contended that the statutes of Indiana imputed to the Indianapolis and St. Louis Railroad Company (although its western terminus was at Terre Haute, and not at the State boundary line,) like powers with those of a railroad company of Indiana meeting a railroad of Illinois at the State line. This is true, and if the case before this Court in 118 U. S. had involved the lease of the line in Illinois only, and had been tried in Illinois, my learned adversary might make good his contention, but that the then fact was to the contrary cannot be disguised or avoided.

The lease, held invalid in that case, was an entirety, of the whole line from St. Louis to Terre Haute, embracing, as an integral part thereof, some miles of railroad within the State of Indiana, lying between the western boundary line of Indiana and the city of Terre Haute in Indiana. As to this part of the property, and therefore as to all the property leased, it was necessary in support of the lease, that power should be shown, given by Indiana law, to lease a railroad situated in Indiana to an Indiana corporation. Upon this question, the fact that part of the railroad was in Illinois had no bearing. Upon this question, the fact that the statute of Indiana imputed to the I. & St. L. Co., whose railroad did not extend west of Terre Haute all the powers, *quoad the Illinois part of the Alton road*, possessed by an Indiana company meeting a railroad of Illinois at the State line, had no bearing. This Court had to decide, not merely that a railroad company of Indiana, whose road did not, in fact, extend to the boundary line, but which was clothed with the powers of a railroad company whose road did extend to the boundary line, might take a lease not only of a railroad in Illinois, but also of a railroad in Indiana lying between its western terminus and the boundary line of Indiana. This the Court refused to do, because it discovered that the State of Indiana had not authorized one railroad company to take the lease of the railroad of another, and therefore, as lessee could not take a lease without embracing that part of the road which was in Indiana, it could not take a lease at all.

Two results are incontrovertible: *first*, that, by statute law of Indiana, an Indiana railroad company owning a road, which does in fact extend to the State line of Illinois, has a right to consolidate with or extend its road into Illinois under such rules and regulations as the latter State may pre-

scribe; and, *secondly*, that if the railroad does not extend into Illinois, but fails to reach the western boundary of Indiana, by no matter how few miles of distance, the Company has no right to take a lease of a railroad extending over the intervening space, and therefore no right to consolidate with, extend into or take a lease of an entire railroad, part of which spans the distance between its western terminus and the eastern boundary line of Illinois.

(C.) Suppose, however, that the construction given by the Supreme Court of Illinois, in the *Archer* case to the contract between the parties, be wrong, and will not be sustained or followed by this Court, and suppose also that the legal effect of the agreement be correctly stated in the amended bill (p. 48, fol. 89), thus:

"And that said pretended lease for nine hundred and ninety-nine (999) years is an attempt on the part of your orator to part with and divest itself of the entire possession and control of the property and franchises of your orator, including all its rights, privileges, powers and immunities incident to the management and control of its said property for such an extended period of time as virtually amounts to a sale in perpetuity and to an absolute surrender of its property, and practical surrender of its entire franchise to a corporation foreign to the State of Illinois, and incapacitates your orator from fulfilling those duties and obligations to the said State of Illinois, and the inhabitants thereof, which are imposed upon it by the acceptance of its charter, which neither your orator nor any of its officers or directors could lawfully do."

Let us assume, in other words, that this contract is in effect a sale, does it not follow, *first*, that so far as Illinois is concerned, such sale is authorized as being within the express power to consolidate

given in the *thirteenth* section of the Vandalia Company's charter (applying the case of *Branch* vs. *Jesup*); and, *secondly*, that it is expressly authorized by the *first* and also by the *second* section of the Indiana Act of 1853, being an extension of its own line into Illinois,

"under such regulations as may be prescribed by the laws of Illinois,"

as well by Rev. Stat., § 3951, as held in *Hill* vs. *Nisbet*, *ut supra*, unless the fact that appellee was created a corporation by special charter prevent Section 3951 from applying to it.

If the amended bill be right in treating the contract in question as a sale, then these provisions of law, together with *Branch* vs. *Jesup*, end this appeal.

I cannot see why this be not true, even if the transaction be treated as a lease. A lease for 999 years is a *sub modo* or qualified sale, and if it be true as said by Mr. Justice BRADLEY in the case of *Branch* vs. *Jesup*, 106 U. S. at page 478, that:

"the greater power of alienating or extinguishing all its franchises, including its own being and existence, contains the lesser power of alienating its road, and the franchises incident thereto, and necessary to its operation."

If the power to lease be embraced within the powers to consolidate and to extend, the power to take such lease having been expressly given by Illinois as held by this Court in the *St. Louis, Alton and Terre Haute* case at page 309 of 118 U. S. it follows that the transaction in question is impregnable against attack, and the parties were wise, as well as just and faithful to their obligations, for the nineteen years during which they abstained from attempting to disturb their relations.

The power to purchase a fee includes the power to purchase a lesser estate, and to take a lease, and the power to sell includes the giving, and the power to buy implies the taking, of a mortgage or lease.

Darling vs. *Rogers*, 22 Wend. 486.
Branch vs. *Atlantic & Gulf R. R. Co.* 3 Woods, 481.
Willamette Mfg. Co. vs. *Bank of British Columbia*, 119 U. S. 191.

In *Leggett* vs. *Perkins*, 2 N. Y. (Comst.), at page 317, Judge CADY says:

"And were it necessary for the purpose of supporting the lease given to the defendant in this case, it might fairly be insisted that the power to make leases was included in the power given in the will to the executors to sell and dispose of all and any part of the testators' estate, both real and personal, &c., at such times and in such manner, and for such sum or sums as to them, in the exercise of their best judgment, may seem most expedient, &c. A power to make leases is a power to alienate a part of the estate (16 Wend., 153), and by the lease in this case a part of the testator's estate was alienated to the defendant. The testator, by the word estate, may have intended his lands, instead of his interest in the lands."

In close analogy to these authorities is the case of *Hill* vs. *Nisbet*, *ut supra*.

The word "extend" used in the second section of the Indiana Act of 1853, has not a definite *legal* meaning. It is a word of very large signification, limited in the statute, only by the—

"regulations * * * * prescribed by the laws of such State or States into or through which said road may be so extended."

Can there be any doubt that in extending its road either within or without Indiana the T. H. & I. Co. was not bound to acquire a fee-simple title or an absolute right of way? Can there be any doubt that it might enter into possession of parcels of its line under parol or written licenses, or take title by lease, with or without privilege or option of purchase, and if it might take title by lease to part, why not to all the extension? That a railroad company having power to build may buy, is now settled. *Branch* vs. *Jesup*, *Hill* vs. *Nisbet*, *ut supra*.

It does not seem to me to be less well settled that it may build or extend by taking a lesser title than the fee simple.

But it may be said in answer to this that the Vandalia road was not merely property, but property qualified and subject to public duties, evidenced by its charter; and that while the State of Indiana may have permitted the acquisition of property for the extension of the line, it has not permitted the acquisition of the franchises. The answer to this is in two sentences. This is a question of Illinois, not Indiana law. And power to "extend" embraces authority to acquire franchises if necessary.

For these reasons it seems plain that the decree of the Circuit Court should be affirmed.

Respectfully submitted,

GEO. HOADLY,
Of Counsel for Appellee.

New York, April 6, 1891.

145 U S 393

145 U S 393

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Supreme Court of the United States.

IN EQUITY.

THE ST. LOUIS, VANDALIA & TERRE HAUTE RAILROAD COMPANY,
Appellant,

vs.

THE TERRE HAUTE & INDIANAPOLIS RAILROAD COMPANY,
Appellee.

APPEAL FROM THE CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS.

Appellee's Reply to Appellant's Briefs.

By the courtesy of Judge TRUMBULL and Mr. BUTLER, I am enabled to prepare this reply to their arguments before the call of the case.

I.

Laches.

It is claimed (Trumbull's brief, p. 72), that the defence of laches depends upon the period fixed by

the statute of limitations, which, in Illinois, is twenty years in the case of an action for the recovery of lands; also (*ibid.*) that although seven years possession and payment of taxes under claim of title bars an action for the recovery of real property in Illinois, this limitation does not apply to cases of—

"lands held for any public purpose,"

and especially does not apply to this case, because (1), the bill discloses no payment of taxes by appellee; (2), if it did, the bar does not arise from the payment of taxes which it was the duty of the party to pay. It does not seem to me necessary to discuss these questions at any length; they will arise soon enough when my learned adversaries, having abandoned this attempt to proceed in equity, shall institute an action at law;—but the proposition that there is nothing to show that we have paid the taxes on the property is directly contradicted by the obligations of the contract between the parties, (fol. 83) which required such payment, to which the presumption of performance applies in the absence of an averment of non-performance.

But the defence of laches does not in any degree depend upon the lapse of the period provided by the statute of limitations. This is so even in States where, by Codes of Procedure, uniform periods of time are prescribed as limitations both at law and in equity.

Calhoun vs. *Millard*, 121 N. Y. 69, shows this very plainly. I quote from the opinion of Judge ANDREWS at pages 81, 82,

"In the present case, the cause of action for the cancellation of the bonds was not barred by the ten years statute applicable to equitable actions. But a period of nine years had elapsed after the bonds were issued before the commencement of the action. But we apprehend that the period of limitation of

equitable actions, fixed by the statute is not, where a purely equitable remedy is invoked, equivalent to a legislative direction that no period short of that time shall be a bar to relief in any case, or precludes the Court from denying relief in accordance with equitable principles for unreasonable delay although the full period of ten years has not elapsed since the cause of action accrued. The ten years limitation was primarily designed to shield defendants (*B. & N. Y. C. R. R. Co.* vs. *Dudley*, 14 N. Y. 352), and it must be true that a Court in the exercise of its equitable jurisdiction could not entertain or enforce a cause of action barred by the statute, and not within any exception, acting upon any general equitable considerations. But in enforcing purely equitable remedies depending upon general equitable principles, unreasonable and inexcusable delay is an element in the plaintiff's case which a Court of Equity always takes into consideration in exercising its discretion to grant or refuse relief, and is not a mere collateral incident. Where there is a remedy at law whereby the plaintiff can prosecute or defend his legal right, the refusal of relief leaves the parties where they were. If there are special circumstances which may change the situation of the plaintiff to his injury unless the equitable remedy is interposed this fact may be considered. But the right of the Court to deny relief upon equitable grounds for long delay, although short of the statute period of limitation, is in the nature of a defence, and is not we think taken away by the statute. There may be a well founded distinction between the case of an application for an equitable remedy in aid of or to enforce a legal right not barred by the statute, and the case where an exclusively equitable remedy is sought, such as to restrain proceedings at law, or upon the principle *quia timet* to deprive an adversary of the muniment of his alleged legal right which he inequitably retains. In cases of the latter class long delay or acquiescence, although short of the statute period for the limitation of equitable actions may be a ground for refusing relief (Pom. Eq. Jur. § 817). The cancellation of securities is a purely equitable remedy and cannot be claimed as an absolute right, nor is it applied for or awarded in aid of a legal right or title."

It is further argued that the bill shows (*fol. 92*), that the discovery of the invalidity of the contract was so recent as to excuse the delay in bringing this suit. The language of the bill is that :—

"Orator * * * has no doubt that when said Board of Directors * * * existing at the time of the making of said pretended lease authorized the execution of, and said Alexander, the then president of your orator executed said pretended lease as aforesaid and allowed said defendant to take possession * * * they supposed that your orator, and they on its behalf and as its directors and officers, had the lawful right to authorize the execution of and to execute the same, and your orator did not know until recently that said lease was null and void, and that your orator through its said directors and officers and by the execution of said pretended lease, had violated the law and exceeded its powers, and for this reason your orator has not heretofore instituted legal proceedings for the purpose heretofore sought; but your orator has been recently advised by its counsel that such lease is null and void, and that it is the duty of your orator at once to repudiate said pretended lease and to resume possession, control and use of its said property and franchises. * * *"

The word "recently" here used is too elastic to justify the contention of the complainant. With greater candour, it seems to me, Judge TRUMBULL now says (Brief, p. 73) :

"In 1886 it became settled for the first time by the decision of this Court in the *Alton* case that appellee, by the laws of Indiana, had no power to accept the lease in controversy, and within a year from that decision the appellant brought the suit to cancel the lease."

Judge TRUMBULL then argues that appellant's mistake was in a matter of fact, not law, because it was caused by ignorance of the want of capacity of the Terre Haute and Indianapolis Company, organized under the laws of Indiana, a foreign State, to take the

lease. One would naturally suppose that an Illinois corporation entering into such a contract with an Indiana corporation is bound to know the legal powers of its co-contractor, and cannot make such a pretence at so late a date. (2 Morawetz on Private Corporations, 591.) Moreover, to one who is advised of the fact that the St. Louis, Vandalia & Terre Haute Railroad Company is controlled by the Pennsylvania Company, that Thomas D. Messler, who, as president, and J. T. Brooks, as solicitor, sign the bill in this case are and have long been respectively Vice-President (fol. 43), and General Counsel of the Pittsburg, Cincinnati and St. Louis Railroad Company, one of the western lines controlled by the Pennsylvania Railroad Company through the Pennsylvania Company, and that the case in 118 U. S. upon which my learned adversaries now rely, was defended and gained by the same Pennsylvania Railroad Company; it would seem as if it might fairly be said that that company experimented with *ultra vires* for the length of time occupied by the litigation reported in 118 U. S. and after finding that it could use this defence successfully as a shield, felt emboldened eighteen months after that case had been argued, and more than fourteen months after the decision, to employ it as a club or instrument of offence to destroy the lease in question. In as much as the St. Louis, Alton and Terre Haute Railroad Company filed its bill in that case on October 25th, 1878, and final decree was rendered on July 27, 1882, (I take these dates from the record of that case), it would seem to follow that the present complainant must have been almost if not quite as well advised of the alleged defect in the laws of Indiana, of which it now complains, in 1878, or at least at as early a date as the filing of its answer in the Alton case, and that with this knowledge, and while engaged in defending that case on the very ground upon which this suit is founded, it for more than eight years continued the unbroken and unques-

tioning performance of the contract sued on in this case. Yet it says it is not guilty of laches!

II.

Complainant's remedy is at law, and not in equity.

In reply to this proposition, my learned friend Mr. Butler argues that it is necessary in this case to maintain the jurisdiction of the Chancellor so as to avoid multiplicity of actions, and points out that a single ejectment will not answer the purpose which complainant has in view, but that it will be compelled to resort to a replevin for the equipment, as if two suits would constitute a multiplicity of actions. We used to be taught that it was not—

> "usual to exhibit a bill in Chancery for quieting a title * * * until after several verdicts at law."

KENT, C. J., in *Huntington* vs. *Nicoll*, 3 Johns. * 601.

In the next place, from what source does my learned adversary get the idea that an action of ejectment may not be maintained for a railroad with the fixtures thereunto appertaining and belonging, namely its equipment? The only authority cited (Butler's brief, p. 29), is the Constitution of Illinois, Sec. 10, Art. 11. But it so happens that the Constitution of Illinois was not adopted in the Constitutional Convention of that State, until the 13th day of May, 1870; was not ratified by the people until July 2d, 1870, and did not go into force until Aug. 8th 1870, (1 Starr and Curtis' Annotated Statutes of Illinois, 99), whereas the contract between these parties was made Feb-

ruary 10th, 1868, and possession taken under it on or about July 1st, 1870. (Record, fol. 88.)

At that time and until the adoption of the Constitution of 1870, the Supreme Court had uniformly held equipment to be part of the realty.

Palmer vs. *Forbes*, 23 Ill. 301.
Hunt vs. *Bullock*, *Ibid.* 320.
Titus vs. *Mabee*, 25 do. 257.
Titus vs. *Ginheimer*, 27 do. 462.

See also

Minnesota Co. vs. *St. Paul Co.* 2 Wall. 645.

But my learned friend Mr. Butler adds the following (Brief, 29):

"In addition to the equipment and movable machinery the *corporate* franchises; which constitute a most valuable part of the *corporate* property—are *personal property*. Would an ejectment suit reach them?"

It seems to me that this question answers itself. I confess that I know of no suit at law (or in equity either), to recover possession of corporate franchises, unless this expression may be used of an action by the State to resume such franchises in case of forfeiture. To my uninformed mind it would seem as though they recovered themselves, without any action, as soon as the property in the maintenance and operation of which they are employed, is restored to the hands of the owner. The corporate franchises of the Vandalia Company have never left that company. They are in its possession and control to-day as fully as if the contract between these parties had never been made.

But to pass to a more serious objection than that founded on the supposed difficulty of restoring corporate franchises through the agency of a *fi fa.*, it is claimed that the relation between the parties is

one of trust. I deny it. The argument and the authorities cited are misapplied. There are undoubtedly trusts within corporations—and again corporations may assume trusts towards third persons—and again there are corporations, such as the Central Trust Company of New York and others of like kind, whose business it is to assume and execute trusts. But the ordinary relation of one corporation to another—most assuredly the relation of the parties to this case to each other—is not one of trust, but of contract, or tort. If this contract were illegal, as is argued, they dealt with each other at arms length, and the remedy must necessarily be at law. The English cases cited are found on usages of business, which do not as a rule prevail in this country. Thus in the case of *Hardy* vs. *Met. Land and Finance Company*, cited by Mr. Butler, at page 31 of his brief, where the opinion of Lord ROMILLY, Master of the Rolls, (L. R. 12 Eq. 386,) was reversed by the Court of Appeals in Chancery (a circumstance which must give us pause at least long enough to consider whether the opinion of the reversed tribunal is not morally, and in this country legally, of higher authority than that of the reversing Court), Lord Justice JAMES said (Mr. Butler's brief, p. 32):

"It is thus, therefore, trust money placed by an improper act of the Directors of the London Building Society in the hands of the defendants, and as they had never discharged themselves from it, it is trust money still in their hands."

This result was reached, either because the London Building Society held the money in trust, and, therefore, the Metropolitan Land Company became substituted as trustee by the transaction, or because the Directors of the London Building Society were trustees for their corporation, and their act in lending or depositing with the Land Company did not change the form of the property from trust money to money

held in ownership. But such is not this case. This is the transfer of the possession of a railroad and equipment by the owner, the Vandalia Company, to the Terre Haute and Indianapolis Railroad Company. To this case the authority of *Graham vs. Railroad Company*, 102 U. S. 148, directly applies. I quote from the opinion of Mr. Justice BRADLEY, at page 160:

"It is contended, however, by the appellant that a corporation debtor does not stand on the same footing as an individual debtor; and whilst the latter has supreme dominion over his own property a corporation is a mere trustee, holding its property for the benefit of its stockholders and creditors; and that if it failed to pursue its rights against third persons whether arising out of fraud or otherwise it is a breach of trust and creditors may come into equity to compel an enforcement of the corporate duty. This, as we understand, is the substance of the position taken.

We do not concur in this view. It is at war with the notions which we derive from the English law with regard to the nature of corporate bodies. A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but, in law, it is as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same. Its stockholders may call the officers to account, and may prevent any malversation of funds, or fraudulent disposal of property on their part. But that is done in the exercise of their corporate rights, not adverse to the corporate interests, but coincident with them."

Indeed, if the contrary were true, all litigation with regard to corporate rights would be transferred, or at least transferable, to Courts of Equity. Every contract made by a corporation would be the subject of examination in equity, because it would relate to the administration of a trust, and the further consequence would follow that the opinions of this

Court, cited in my former brief, would require material qualification. Thus in *Railway Companies* vs. *Keokuk Bridge Company*, from which I cited the opinion of Mr. Justice GRAY, (page 14 of my former brief), his language,

"but the proper remedy of the party aggrieved is by disaffirming the contract and suing to recover as on a *quantum meruit*, the value of what the defendant has actually received the benefit of,"

might be criticised as incomplete because wanting the following addition,

"or by a bill in equity for rescission and compensation."

And Mr. Justice GRAY's opinion at the present term in *Central Transportation Co.* vs. *Pullman's Palace Car Company* (cited at page 16 of my former brief), the language,

"in such case, however, the action is not maintained upon the unlawful contract nor according to its terms, but upon an implied contract of the defendant to return or failing to do that, to make compensation for property or money which it has no right to retain,"

would be complete only with the addition of the words,

"in an action brought at law or in equity for that purpose."

It is sought to establish the right to sue in equity, by a supposed public policy of either Indiana or Illinois. Irrespective of the question whether the action of ejectment or replevin may in any case be transmuted into a right to sue in equity, because the plaintiff is not only the assertor of his own private right, but the vindicator of public morals, I deny that there exists any such public policy in either of these States.

As to Illinois:

First:—This Court decided, in *Pennsylvania Company* vs *St. Louis, Alton and Terre Haute Railway Company*, that the power to lease was given by the act of 1855.

Secondly:—The act of 1865 recognizes and affirms the same public policy, but attaches the condition of (Record, fol. 161),

"the written consent of the stockholders of said roads residing in the State of Illinois."

Thirdly:—The charter of the Vandalia Company Section 13, provides that:

"said company shall have power to consolidate and connect its railroad with any other continuous line of railroad now constructed, or which may be hereafter constructed, either in this State or in the State of Indiana, upon such terms as may be agreed upon between the companies so connecting or uniting, and for that purpose full power is hereby given to said company to make and execute such contracts with any other company as will secure the object of such consolidation or connection."

Fourthly:—It was held in the Archer case (102 Ill. 493), that the present contract is valid, and the contract was enforced to the extent of requiring the payment of taxes by the Terre Haute and Indianapolis Railroad Company upon its capital stock within the State of Illinois.

Mr. Butler seems to think (Brief, p. 90) that revenue cases are not decided with the same careful consideration employed by Courts in other controversies. This surprises me, although I have known unsuccessful defendants in that class of cases to indulge in views of this character. It will surprise me still more if this observation of my learned friend meet the approval of this Court.

It was held in *Ill. Mid. Ry. Co.* vs. *People*, 84 Ill. 426, that (p. 429):

"Under the act of February 12, 1855, all railroad companies have power to make contracts and arrangements with each other for leasing or running their respective roads or any part thereof."

The only suggestion of an adverse public policy in Illinois is founded on the proviso to an act passed in the Illinois legislature on the 30th day of June, 1885, more than half a generation after the contract in controversy had been executed and enforced. This is a proviso, not a declaration of general policy. It seems to me to be one of those ill-considered suggestions often adopted by a legislature in haste. The act provides that railroad companies of Illinois may purchase and hold in fee simple, or otherwise use and enjoy the railroad property and franchises of companies of other States. The *second* section authorizes Illinois railroad corporations to borrow money and issue their mortgage bonds to enable them to pay for properties so acquired,

"in fee simple or otherwise."

Then follows the proviso:

"And provided further that nothing in this act shall be so construed as to authorize any corporation other than those organized in and under the laws of this State to purchase or otherwise become the owners, lessee or lessees of any railroad within the State."

I quote from pages 80-81 of Mr. Butler's brief.

This is not a proviso to the Illinois Act of 1855, or of 1865, but of 1885, and it is nothing but a proviso. That is manifest from its expressed terms:

"nothing in this act shall be so construed as to authorize," &c.

It is, however, a proviso to an act which, by no possibility, could be construed by any Court, or under any circumstances, to have had the

effect which the proviso excepts. It is therefore simply a piece of improvident legislation, which may perhaps be taken to mean that the legislature that adopted it, did not intend to allow corporations of other States than Illinois to become the owners or lessees of railroads in Illinois. It is however asking too much, I respectfully submit, to call on gentlemen living in other States, and who hold the State of Illinois in high respect, to accept a proviso like this, so entirely *malapropos* to the body of the act, to which it purports to create an exception, as establishing the intelligent and settled high public purpose of the people of Illinois. Even in 1885, when this proviso was inserted in the statute book, the legislature did not repeal the Act of 1855. It stands among the statutes of Illinois to this day (2 Starr and Curtis' Ann. Stat. 1921), although five years have elapsed since it was construed by Mr. Justice Miller in this Court as authorizing the lease of Illinois railroads to Indiana railroad companies. So much for the public policy of Illinois.

As to Indiana.—This Court may be of opinion that, notwithstanding the invitation of Illinois, the legislature of Indiana has not authorized corporations of the latter State to take leases of railroads in Illinois. Nevertheless, it can hardly be said that a public policy exists in Indiana to that effect: *first*, because the Indiana act of 1853, which still stands upon the statute book, authorizes consolidation with the railroads of other States, and under this and other like acts, the Lake Shore, Pittsburgh, Cincinnati and St. Louis, Chicago and Atlantic, and a multitude of other railroad companies of Ohio as well as Illinois have been consolidated with railroad companies of Indiana. In the *second* place, it authorizes the extension of an Indiana railroad into Illinois and Ohio;—in the *third* place, it authorizes contracts for transportation over and use of railroads in other States;—in the *fourth* place, the Revised Statutes of

Indiana, Section 3951 (originally adopted March 3, 1865), authorizes any railroad company of Indiana to—

"contract for the use and enjoyment in whole or in part of any railroad or railroads lying within adjoining States."

It is quite true that this is part of the body of a statute containing a system for the reorganization of railroads sold at judicial sale, but this fact only accentuates and emphasizes my contention as to the public policy of the State of Indiana. Surely if Indiana has provided that a railroad company, created after insolvency of its predecessor, upon a reorganized basis following a judicial sale, may purchase or contract for the use of a railroad in an adjoining State, it will hardly do to say that a public policy exists in the State of Indiana forbidding such purchase or contract for use and enjoyment, (words broad enough to embrace a lease or any other arrangement).

The prayer of the amended bill in the present case is divided into five paragraphs.

First.—That—

"the said pretended lease may be declared to be null and void, and that said defendant be decreed to cancel and surrender the same."

This is relief *quia timet*, which can only be had by one in possession.

Second.—For possession; with injunction against interference therewith. The *first* branch of this relief is to be had by action of ejectment, or actions of ejectment and replevin. The *second* is *quia timet*, to be claimed only by one in possession.

Third.—For an accounting. This relief can only be had by enforcing—not by disregarding and annulling the contract. If the contract be treated as void, the proper remedy is in damages for mesne

profits of the realty, and for the detention of the personalty

Fourth.—Omitted in amending the bill.

Fifth.—For injunction and Receiver *pendente lite.* This being only in aid of the other relief sought need not be considered here.

Sixth.—For general relief. The remark last made also applies to this paragraph.

III.

Validity of the Contract.

It is admitted by Mr. Butler that the lease considered and held invalid in 118 U. S., embraced ten or twelve miles of raiload in Indiana. The contract now in controversy embraces no property in Indiana. Mr. Butler argues that the statute of Indiana gave to the Indianapolis and St. Louis R. R. Co. the powers of a corporation meeting another at the State line. Agreed. But this did not make the railroads in fact meet at the State line, or transport the twelve miles into Illinois, or dispense with the necessity of establishing (the property leased being both in Illinois and Indiana), that the State of Indiana had given authority to the Indianapolis and St. Louis Railway Company to take a lease of the ten or twelve miles of railroad in Indiana as well as of the longer distance in Illinois. This was an essential feature of that case which distinguishes it absolutely from the present.

The learned counsel, who then represented the St. Louis, Alton & Terre Haute R. R. Co. originally rested his defence of the transaction entirely upon the *third* section of the Indiana Statute of 1853. To me it does not appear that he changed his position in the petition for a rehearing. That he was

justified in putting the case on that ground only is manifest from the fact that, although the State of Indiana had given to his client the rights of a corporation meeting another at the State line, the State of Illinois never had or could have empowered it to penetrate into tho State of Indiana for the distance of twelve miles, and there to connect its railroad with that of another corporation leasing to it such portion of the railroad as might be found within the latter as well as the former State. Power had been given by Illinois, as this Court held must be conceded, to lease that part of the railroad lying in Illinois, but neither Illinois nor Indiana ever gave any authority to lease that part of the railroad situate in Indiana. Illinois could not, and Indiana did not.

From all this confusion we are delivered by the plain application of the *first* and *second* sections of the Indiana Act of 1853. These gave to the Terre Haute and Indianapolis R. R. Co. two substantial powers, one to consolidate with the railroad of another company which it might meet at the State line, the other to extend its own road into Illinois subject to such regulations as Illinois might prescribe. No amount of legislation by Indiana could alter the geographical fact. No amount of imputation, by Indiana, to a company whose actual western terminus was at Terre Haute, of the rights of a company whose western terminus might be at the State line, could change the results of this geography. To make a consolidation by the Terre Haute and Indianapolis R. R. Co. with an Illinois railroad corporation, or the extension of its own road into Illinois, subject to the regulations prescribed by Illinois valid, it is only necessary to show that the legal and actual western terminus of the Terre Haute and Indianapolis R. R. Co. is at the boundary line dividing the States of Indiana and Illinois.

At the time the contract was made, the legal terminus was at this point. But the Indiana Com-

pany had not then built beyond Terre Haute. It constructed its twelve miles under its charter from Terre Haute to its western terminus, in order that it might have the right to acquire the benefits of this contract. Reaching the western boundary line of Indiana, it did acquire these two franchises, the right to consolidate and the right to extend. It also acquired the rights conferred by the *third* section of the act, namely, the right to "use the railroad of an Illinois company." The extent and limitations of the rights thus conferred are to be found by examining the three cases cited in my former brief, viz., *Branch* vs. *Jesup*, *Hill* vs. *Nisbet* and *Archer* vs. *Terre Haute and Indianapolis R. R. Co.* I deny that Georgia law gave to the companies whose rights were considered in *Branch* vs. *Jesup* greater powers than Indiana law conferred on the Terre Haute and Indianapolis R. R. Co. Doubtless Georgia law conferred greater powers than those which were asserted in defence of the contract set up in the case in 118 U. S. but this Court was not there called upon, nor did it pronounce upon the serious questions now submitted, involving an enquiry into the right conferred by Indiana to extend, and the right to consolidate.

The power having been thus clearly conferred by Indiana, the regulations defining and limiting its exercise having been left by Indiana to be prescribed by Illinois, we turn to the legislation of the latter State, and find, *first*, that the Illinois Act of 1855 conferred express power to make the contract in question, *secondly*, that it has been held valid by the Supreme Court of Illinois, and *thirdly*, that the only attempted limitation of the power, viz., that contained in the Act of 1867, requiring the written consent of stockholders, was repealed in 1874. But it is said that this written consent was in the nature of a condition precedent because the statute pro-

vided that in its absence such corporate action should be "null and void."

But "null and void" does not necessarily "null and void" in all courts and places, under all times and circumstances, or upon the dispute of all persons. It means shall be "null and void," if challenged by those who are entitled to the protection of the act. Such language is not uncommon in legislation. A few instances will suffice. The statute of frauds and perjuries of Ohio in 1824, (as now, Rev. Stat. of Ohio, § 4196), provided that conveyances in fraud of creditors—

"shall be deemed utterly void and of no effect."

In *Lessee of Burgett* vs. *Burgett*, 1 Ohio 469, this act was claimed to be—

"absolutely void without any qualification, reservation or condition."

This was the language of the counsel for the defendant, who added that the statute—

"is positive and peremptory, * * * nor can any philologist, judge or chancellor discover anything in the statute itself that can justify him in giving it a meaning that would lead to or justify condition, provision or reservation."

The opinion of the Court by Judge BURNET was to the effect that such conveyance was not void, except against creditors or subsequent purchasers, and this decision has been ever since followed in Ohio.

In *Davenport* vs. *The Queen*, L. R. 3 Appeal Cases, 115, the Court say:

"It is contended, however, that this rule of construction is inapplicable when the Legislature has imposed the condition. But in many cases the lan-

guage of statutes, even when public interests are affected has been similarly modified. Thus, where the statute provided that if the purchaser at an auction refused to pay the auction duty, his bidding should be null and void to all intents and purposes; it was decided that the bidding was void only at the option of the seller, though the object of this act was to protect the revenue."

See also *Piscataqua Ferry Co.* vs. *Jones*, 39 N. H. 491.
Pearsoll vs. *Chapin*, 44 Penn. St. 9.

The exception to the rule relates to a single class of cases only, namely, statutes enforcing a high public policy or good morals, *e. g.* as against usury or gaming.

In Maxwell on Interpretation of Statutes, p. 90, the learned author says:

"It has been said that where a statute not only declares a contract void, but imposes a penalty for making it, it is not voidable merely. In general, however, it would seem that where the enactment has relation only to the benefit of particular persons, the word would be understood as *voidable* only at the election of the persons for whose protection the enactment was made and who are capable of protecting themselves; but that when it relates to persons not capable of protecting themselves, or when it has some object of public policy in view which requires the strict construction, the word receives its natural full force and effect."

It may be suggested that the *Archer* case admitted that if construed as a lease, the contract in question would be void, because of non compliance with the Illinois act of 1865. But the fact of the previous repeal of that act was not then called to the attention of the Court, and in *Thomas* vs. *Citizens Horse Ry. Co.* 104 Ill. 462, decided some months after the *Archer* case, a statute was under consideration which authorized a railway company to

borrow money and mortgage its property and franchises to secure the payment of a debt,—

"but the concurrence of the holders of two-thirds in amount of the stock of such corporation, to be expressed in the manner and under all the conditions provided in the 15th section of this act, *shall be necessary to the validity of any such mortgage*, and the order or resolution for such mortgage shall be recorded, as provided in the 2d section of this act."

The consent required was given, but not under the conditions provided in the act. Commenting on this the Court say (p. 466, italics mine):

"Whether the stockholders received such a notice of the meeting as the statute requires, is a matter of no importance. If they met and acted upon the question, their action will be as binding as if they had the proper notice. * * * The statute requiring the concurrence of the holders of two-thirds in amount of the stock of the corporation before a loan should be made and a mortgage executed, *was no doubt passed for the protection of stockholders*. It is a matter in which the public have no interest, and it may be true, if the owners of two-thirds of the stock had not concurred, they might, in a proper proceeding, have avoided the mortgage, but as they did concur in the loan and the mortgage, they are concluded by such concurrence."

I submit that this passage states the more mature opinion of the Supreme Court of Illinois, reached after argument, and modifies the *Archer* case to the extent of establishing that the requirement, in the act of 1865, of the written consent of stockholders, was for their protection, not that of parties dealing with the company, against whom such stockholders assert no right, and that, in the absence of a complaint by stockholders, the third party has, by entering into the contract, affirmed not only his own right, but that of his co-contractor, to engage in the undertaking.

In addition to what was said in my original brief with regard to the Illinois act of 1855, I submit the following: As originally adopted that act had three sections; the *first* and *second* are quoted at pp. 30 to 33 of my brief; the *third* is quoted by Mr. Butler at pp. 77 and 78 of his brief. It was in the following words (italics mine):

"Section 3. Every railroad incorporated or organized or which may hereafter be incorporated or organized under the laws of this State shall have power to borrow such sums of money, from time to board, as may, in the opinion of the directors or a majority of them be necessary for constructing, building or operating their railroad or for aiding *in the construction or operating any connecting railroad whether within or without this State.*"

To this quotation Mr. Butler adds (p. 78):

"This third section of the act of 1855 has been repealed, showing that it is the policy of Illinois to prohibit its railroad corporations from putting their funds at risk for any other purpose than the construction and operation of the roads named and described in their charters."

To which I reply that the *third* section of the Act of 1855 was in force at the time of the making of the contract now in controversy, and until four years after possession had been taken and continued under it;—it was repealed by the general repealing act of 1874. (Chapter 131 of the Revised Statutes of Illinois, 2 Starr & Curtis Annotated Statutes 2344, paragraph 289.) Therefore, if Mr. Butler's argument founded on the repeal of this *third* section have any force, the fact that it was not repealed until six years after the contract now in controversy was made, and four years after the railroad had been finished and the contract gone into full effect, establishes my contention, viz.: that the public policy of Illinois and the authority of Illinois, at the time of the execu-

tion of this contract, permitted railroad companies to borrow money for the purpose of—

"aiding in the construction or operating any connecting railroad, whether within or without this State."

Mr. Butler (p. 95), says that either the author of this brief or one of his associates ("Counsel for Appellee" is the term he uses),

"advanced and urgently pressed this proposition, viz.: that by the *comity* between States or by express legislative license a corporation of one State might greatly enlarge its powers by doing business in another State than that of its creation. In other words, that the appellee acquired powers by doing business in Illinois which it did not possess in Indiana. This might properly be called the theory of *enlargement of corporate powers by migration.*"

Whatever wit this argument of my learned friends may possess, it unfortunately is wanting in that verity which is the basis of all wit. My learned adversary fails to appreciate the argument made at Circuit, although it was advanced and urgently pressed both orally and in print. The proposition was this, that while the law of *comity* (which is nothing but usage sanctioned by judicial decision), did not and could not extend the powers of a corporation of another State beyond those which it might exercise in its domicile, the State in which it attempts to act might, by express grant, confer any power or authority not forbidden by the law of its domicile.

I see no more difficulty in conferring such power, by express statute, in Illinois, upon the Terre Haute and Indianapolis Railroad Company, than in converting it into a corporation of Illinois, and then conferring power on it as such.

My learned friend seems to think there is some magic in converting the corporation of one State into a corporation of another, which would enable it, in the capacity of a corporation of the latter State to accept some power which could not be taken but for its receiving new corporate life in this way. To me corporate power seems only a method of enabling living human beings to accomplish results, and I am unable to appreciate the legal prestidigitation which would sanction acts done under the authority of the Illinois legislature, by the Terre Haute and Indianapolis Railroad Company, if formally adopted as a corporate step-child of Illinois, than if remaining a corporation of Indiana only, but clothed with power by Illinois, the acceptance of said power not having been inhibited by Indiana.

Mr. Butler says (p. 76) that no counsel in the case reported in 118 U. S. ever questioned the authority of the Illinois corporation to enter into the contract, the reason given being that the Illinois legislature had legalized the contract,

"and adopted the I. & St. L. R. R. Co. as a corporation of Illinois (3 Priv. Laws. Ill. p. 316). With this special act in view no one of the counsel opposed to the St. L. A. & T. H. R. R. Co. in that litigation ever dreamed of questioning the validity of the operating contract as to that corporation."

But my learned friend fails to observe that this private act and this adoption of the I. & St. L. R. R. Co. as a corporation of Illinois did not add one iota to its power beyond that which a general law authorizing corporations of other States to enter into contracts of this kind, passed by the Legislature of Illinois, would have conferred. There is no difference in substance between these two proceedings; the difference is all in form and method, nothing more. In *Canada Southern R. R. Co.* vs.

Gebhard, 109 U. S., 537, Chief Justice Waite states the rule thus (italics mine):

"A corporation 'must dwell in the place of its creation, and cannot migrate to another sovereignty' (*Bank of Augusta* vs. *Earl*, 13 Pet. 588), though it may do business in all places where its charter allows and the local laws do not forbid. (*Railroad* vs. *Koontz*, 104 U. S. 12.) But wherever it goes for business it carries its charter, as that is the law of its existence. (*Relf* vs. *Rundel*, 103 U. S. 226), and the charter is the same abroad that it is at home. *Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere.* A corporation of one country may be excluded from business in another country (*Paul* vs. *Virginia*, 8 Wall. 168), but, if admitted, it must, *in the absence of legislation equivalent to making it a corporation of the latter country*, be taken, both by the government and those who deal with it, as a creature of the law of its own country, and *subject to all the legislative control and direction that may be properly exercised over it at the place of its creation.*"

I accept every word of the foregoing. This lucid exposition of the law emphasizes the value of the statement of my original brief (page 36), that no disabilities have in fact been placed upon this corporation at home. I need not add that the legislative control of Indiana to which the T. H. & I. Co. is liable to be subjected at home, and which the Vandalia Company must recognize and submit to, has never been attempted in disparagement of the present contract. The learned Chief Justice was in this passage considering the case of comity, and not of express legislative authority. The wise suggestion, which he makes, that, in the absence of legislation equivalent to creating it a corporation of the other State, it must be taken both by the government, and those who deal with it, as a creature of the law of its domicile, brings

into clear light the only effect of making it a corporation of such State, viz.: that the annihilation of its corporate life in the State of its domicile, by judgment in *quo warranto* or *scire facias*, or by the exercise of the reserved power of legislative repeal, would not affect its destruction as a body corporate of the State of its adoption. The natural persons, whose lawful agency it is, (and it is nothing more), would still remain incorporated in the State, into which it may be said to have migrated, if it have been incorporated there;—otherwise the forfeiture of the charter in the State of its domicile would forfeit their right to act in a corporate capacity everywhere.

New York, April 22, 1891.

Respectfully submitted,

GEO. HOADLY,
Of Counsel for Terre Haute & Indianapolis Railroad Company,
Appellee.